TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. ~~301~~. 117

THE MUTUAL BENEFIT LIFE INSURANCE COMPANY OF NEW JERSEY, PLAINTIFF IN ERROR,

vs.

KATHERINE SALENTINE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

FILED OCTOBER 4, 1886.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 391.

THE MUTUAL BENEFIT LIFE INSURANCE COMPANY OF NEW JERSEY, PLAINTIFF IN ERROR,

vs.

KATHERINE SALENTINE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

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1 Circuit Court of the United States for the Eastern District of Wisconsin.

UNITED STATES OF AMERICA,
Eastern District of Wisconsin, } *ss:*

At a stated term of the circuit court of the United States for the eastern district of Wisconsin, begun and held, according to law, at the city of Oshkosh, in said district, on the second Tuesday (being the thirteenth day) of July, A. D. 1886—present, the Honorable Walter Q. Gresham, circuit judge, presiding, and the Honorable Charles E. Dyer, district judge; F. H. West, marshal; Edward Kurtz, clerk—among other, the following proceedings were had, to wit:

KATHERINE SALENTINE
vs.
THE MUTUAL BENEFIT LIFE INSURANCE CO. OF NEW JERSEY. } At Law.

Be it remembered that heretofore, to wit, at a stated term of said court begun and held, according to law, at the city of Milwaukee, in said district, on the first Monday (being the sixth day) of October, A. D. 1884—present, the Honorable Charles E. Dyer, district judge, presiding—and on the first day of said term, to wit,
2 on the 6th day of October, A. D. 1884, the following proceedings were had, to wit:

Order Docketing Case.

KATHERINE SALENTINE
vs.
THE MUTUAL BENEFIT LIFE INSURANCE COMPANY OF NEW JERSEY. } At Law.

This day came the defendant's counsel, Messrs. Jenkins, Winkler & Smith, and presented to the court a copy of the docket entries, together with the original process, pleadings, and proceedings in this cause, certified from the county court for Milwaukee county, in this district, pursuant to an order of said court removing the case to this court, including the original petition of said defendant for such removal, its bond required by law therefor, and said order of removal. Whereupon it is ordered by the court that the said papers be filed, and that the cause be entered on the law docket of this court and be proceeded with in the same manner as if it had been commenced here by original process.

Which certified copies are as follows, to wit:

3 *Summons.*

County Court, Milwaukee County.

KATHERINE SALENTINE, Plaintiff,
v.
THE MUTUAL BENEFIT LIFE INSURANCE COMPANY of NEW JERSEY, Defendant.

The State of Wisconsin to the said defendant:

You are hereby summoned to appear within twenty days after service of this summons, exclusive of the day of service, and defend the above-entitled action in the court aforesaid; and in case of your failure so to do judgment will be rendered against you according to the demand of the complaint.

E. P. SMITH, NATH. PERELES & SONS,
Plaintiff's Attorneys.

P. O. address, 472 East Water St., corner of Oneida, Milwaukee, Milwaukee county, Wis.

D. G. ROGERS, *Of Counsel.*

Dated Milwaukee, May 16th, 1884.

(Endorsed:) Milwaukee county, *ss*: I certify that on the 17th day of May, 1884, at the city of Milwaukee, in said county, I served the within summons on the within-named defendant, The Mutual Benefit Life Insurance Company, by delivering a copy thereof personally to and leaving the same with H. Nichols, the agent of said defendant, at said city of Milwaukee. John Bentley, sheriff,
4 by John W. Dunlop, under sheriff. Fees, $1.40. Filed May 29, 1884. Christoph. Paulus, clerk.

Complaint.

County Court, Milwaukee County, Wisconsin.

KATHARINE SALENTINE, Plaintiff,
against
THE MUTUAL BENEFIT LIFE INSURANCE COMPANY, Defendant.

The plaintiff herein, by E. P. Smith & Nath. Pereles & Sons, her attorneys, complaining, alleges the following facts constituting her cause of action against the above defendant:

I. That the defendant, at the time of the transactions hereinafter set forth, was, ever since has been, and still is a foreign corporation created and existing under and by virtue of the laws of the State of New Jersey, and duly licensed to do business and to sue and to be sued within this State.

II. That on the nineteenth day of September, A. D. 1881, the

said defendant, in consideration of the sum of ninety-seven and forty one-hundredths dollars to them in hand paid by the above-named plaintiff, wife of Peter Salentine, hereinafter named, residing in the city of Milwaukee, Wisconsin, and of the annual premium of ninety-seven and forty one-hundredths dollars, to be paid on the nineteenth day of September in every year during the continuance of the policy hereinafter named, did, by their agents duly
5 authorized thereunto, make and deliver to the plaintiff their certain policy of insurance of that date, and numbered 105,844, on the life of said Peter Salentine, the husband of said plaintiff, who had a valuable interest in the life of her said husband, in the amount of two thousand dollars, for the term of life, and did therein and thereby promise and agree to and with the said Katharine Salentine well and truly to pay or cause to be paid the sum of two thousand dollars therein mentioned, at their office, in the city of Newark, to the said Katharine Salentine, within ninety days after due notice and satisfactory proof of the death of the said Peter Salentine; and it was therein further promised and agreed by the defendant that in case the said Katharine should die before the decease of said Peter Salentine, then the amount of the said insurance should be payable to their children born of said marriage or to their guardian, if under age, within ninety days after due notice and satisfactory proof of interest and of the death of said Peter Salentine, deducting therefrom all indebtedness of the party to the company, together withthe balance, if any, of the year's premium.

III. That thereafter, on the 6th day of January, 1884, at the city of Milwaukee, Wisconsin, the said Peter Salentine died, said
6 policy then being in full force and operation, which death was not caused by or from the intemperate use of stimulants or narcotics, nor by his, the said Peter Salentine's, own hand, nor in consequence of the violation of any law, nor by the hands of justice, nor from any cause mentioned in said policy as making the same void and of no effect.

IV. That the death of the said Peter Salentine was from causes within the true intent and meaning of said policy of insurance, and that the said Peter Salentine and this plaintiff each duly fulfilled all the conditions of the said policy of insurance on his or her part therein contained.

V. That due notice and satisfactory proof of the death of said Peter Salentine was by this plaintiff duly made, given, and furnished to said defendant on the 22nd day of January, 1884, as required by the terms of the said policy and the rule of the defendant, within one year after his decease.

VI. That, although demanded, no part of said insurance has been paid, and the said sum, with interest from ninety days after the date of said proof, is now due thereon from the said defendant to this plaintiff.

7 VII. Wherefore the plaintiff demands judgment against said defendant for the sum of two thousand dollars and in-

terest as aforesaid, together with the costs and disbursements in this action.

E. P. SMITH & NATH. PERELES & SONS,
Plaintiff's Attorneys.

D. G. ROGERS, *Of Counsel.*

STATE OF WISCONSIN, } ss:
Milwaukee County, }

Katharine Salentine, the above-named plaintiff, being duly sworn, deposes and says that she is such plaintiff; that the foregoing complaint is true to her own knowledge, except as to those matters therein stated on information and belief, and as to those matters she believes it to be true.

her
KATHARINE x SALENTINE.
mark.

Subscribed and sworn to before me this 26 day of May, A. D. 1884.
R. T. REUKEMA,
Notary Public.

Endorsed: Filed May 29, 1884. Christoph. Paulus, clerk.

Answer.

County Court, Milwaukee County.

KATHARINE SALENTINE
against
THE MUTUAL BENEFIT LIFE INSURANCE COMPANY. } Suit on Policy No. 105,844.

The defendant in the above-entitled action, answering the complaint therein, admits that the defendant issued to the plaintiff a policy on the life of Peter Salentine, her late husband, as in the complaint alleged, and says that such policy expressly provided in the body thereof that in case said Peter Salentine should die by his own hand said policy should be void, null, and of no effect, except that in case he should die by his own hand while insane the amount to be paid by the defendant on said policy should be the amount of the premiums actually paid thereon, with interest.

And this defendant, further answering, admits that said Peter Salentine died at the time in said complaint alleged, but says that he died by his own hand; that he purposely, willfully, and knowingly took his own life; that the defendant is informed and believes that it is claimed on the part of said plaintiff that said Peter Salentine at the time he so took his life was insane. Whether or not said defendant [plaintiff] then was insane this defendant has no knowledge or information sufficient to form a belief, but insists that if so said plaintiff is entitled to recover only the premiums actually paid on

account of said policy, with interest, and says that it is and always has been ready and willing and has offered, prior to the commencement of this action, to repay such premiums and interest to the plaintiff. This defendant admits the receipt of notice and
9 proof of death of said Peter Salentine on the 28th day of January, 1884.

And further answering, this defendant denies each and every allegation in the complaint contained not hereinbefore admitted.

JENKINS, WINKLER & SMITH,
Defendant's Attorneys.

MILWAUKEE COUNTY, *ss:*

F. C. Winkler, being duly sworn, says that he is one of the defendant's attorneys in this action; that none of the officers of said defendant are within the State of Wisconsin; that deponent verily believes the foregoing answer to be true, and his grounds of belief are a copy of the policy therein mentioned and information he has received, both from the defendant and from other persons, in reference to the death of the insured therein mentioned.

F. C. WINKLER.

Subscribed and sworn to before me this 16th day of June, 1884.

CHAS. E. WILD,
Notary Public, Wisconsin.

Endorsed: Filed June 26, 1884. Christoph. Paulus, clerk.

Notice of Trial.

County Court, Milwaukee County.

KATHARINE SALENTINE, Plaintiff,
vs.
THE MUTUAL BENEFIT LIFE INSURANCE COMPANY of NEW JERSEY, Defendant.

Please take notice that the above-entitled action will be
10 brought to trial at the general term of the above-named court, to be held at the court-house, in the city of Milwaukee, in the said county of Milwaukee, on the first Monday of September next, at the opening of court on that day, or as soon thereafter as counsel can be heard.

August 18th, 1884.
Yours, &c.,

E. P. SMITH, NATH. PERELES & SONS,
& D. G. RODGERS, *Pl'ff's Att'ys.*

To Messrs. Jenkins, Winkler & Smith, att'ys for def't.

Service of a copy of above notice admitted this 18th day of August, 1884.

JENKINS, WINKLER & SMITH,
Att'ys for Defendant.

Note of issue in the above-entitled cause.

E. P. SMITH, NATH. PERELES & SONS,
D. G. ROGERS, *Pl'ff's Att'ys.*
JENKINS, WINKLER & SMITH,
Def't's Att'ys

Issue of fact for court joined June 17th, 1884. Filed by Nath. Pereles & Sons.
Filed Aug. 20, 1884.

CHRISTOPH. PAULUS, *Clerk.*

Notice.

County Court, Milwaukee County.

KATHARINE SALENTINE
against
THE MUTUAL BENEFIT LIFE INSURANCE COMPANY.

Please take notice that the defendant in the two actions entitled as above, one of which is brought on policy number 105,844 and the other on policy number 115,218, issued by the defendant to the plaintiff, hereby asks the consent of the plaintiff that said two actions be consolidated, and requests the plaintiff to notify defendant's attorneys of such consent, the defendant intending to move for the consolidation of the same unless such consent is given.

Yours, &c., JENKINS, WINKLER & SMITH,
Defendant's Attorneys.

To Mess. N. Pereles & Sons & E. P. Smith, plaintiff's attorneys.

Endorsed: Due service admitted June 17th, 1884. E. P. Smith, N. P. & Sons, pl'ff's att'ys. Filed June 26, 1884. Christoph. Paulus, clerk.

Order of Consolidation.

County Court, Milwaukee County.

KATHARINE SALENTINE *vs.* THE MUTUAL BENEFIT LIFE INSURANCE COMPANY.	Action on Policy No. 105,844.
KATHARINE SALENTINE *vs.* THE MUTUAL BENEFIT LIFE INSURANCE COMPANY.	Action on Policy No. 115,218.

These causes coming on to be heard upon the application of the

defendant in each of the above-entitled actions to consolidate the two actions, and on reading and filing the complaints and answers in said cause, and the affidavit of Fred. C. Winkler, one of the attorneys for the defendant in each of said actions upon which said application was made, and after hearing counsel for the respective parties, it is ordered that the several causes above entitled be,
12 and they are hereby, consolidated into one action in this court, and that the several statements of the causes of action in the respective complaints stand as the complaint in said consolidated action, and that the several defenses stated in the respective answers stand as the answer in said consolidated action.

Dated Milwaukee, June 28, 1884.

By the court:

J. C. MANN,
County Judge.

Endorsed: Filed June 28, 1884. Christoph. Paulus, clerk.

Affidavit of F. C. Winkler.

County Court of Milwaukee County.

KATHERINE SALENTINE *ag'st* THE MUTUAL BENEFIT LIFE INSURANCE COMPANY.	Action on Policy No. 105,844.
KATHERINE SALENTINE *against* THE MUTUAL BENEFIT LIFE INSURANCE COMPANY.	Action on Policy No. 115,218.

MILWAUKEE COUNTY, *ss:*

F. C. Winkler, being duly sworn, says that he is one of the attorneys of the above-named defendant in both of the above-entitled actions; that the plaintiff and defendant in each of said two actions are the same; that said actions were commenced at the same time and are now pending in this court; that the defendant has appeared in each of the actions; that copies of the complaint have been served in each of the actions on the defendant's attorneys
13 therein, and that a duly verified answer has been served in each of the actions; that the issues in the two actions *is* substantially the same, as does fully appear by the complaints and answers in the two cases; that the only question of fact in the two cases or either of them is the manner in which Peter Salentine, the late husband of the plaintiff, came to his death and his mental condition previous to and at the time of his death; that said question will necessarily be litigated in each of the cases and will be necessarily the same in each.

Deponent further says that the plaintiff's attorneys are the same in said two actions; that the answers in said actions were served on the 17th of June, 1884; that at the same time the defendants served on the plaintiffs a written request to consent to the consolidation of said two actions; that the plaintiff's attorneys have verbally answered deponent that they would not consent thereto.

F. C. WINKLER.

Subscribed & sworn to before me this 26th day of June, 1884.

CHAS. E. WILD,
Notary Public, Wisconsin.

Upon the foregoing affidavit and the complaints and answers in the two actions of which the same is entitled, and on motion of Jenkins, Winkler & Smith, attorneys for the defendant in said two actions, it is ordered that the plaintiff in said two actions show
14 cause before the court, at the court-house, in the city of Milwaukee, on the 28th day of June, 1884, at the opening of court or as soon thereafter as counsel can be heard, why said two actions should not be consolidated, and that a copy of this order and the foregoing affidavit be served on the plaintiff's attorneys on or before the 27th day of June, 1884.

Dated June 26, 1884.

J. E. MANN,
County Judge.

Endorsed: Due service admitted June 26, 1884. E. P. Smith, N. P. & Sons, pl'ff's att'ys. Filed June 28, '84. C. Paulus, clerk.

County Court, Milwaukee County.

KATHARINE SALENTINE, Plaintiff,
vs.
THE MUTUAL BENEFIT LIFE INSURANCE COMPANY OF NEW JERSEY, Defendant.

The State of Wisconsin to the said defendant:

You are hereby summoned to appear within twenty days after service of this summons, exclusive of the day service, and defend the above-entitled action in the court aforesaid; and in case of your failure so to do judgment will be rendered against you according to the demand of the complaint.

E. P. SMITH, NATH. PERELES & SONS,
Plaintiff's Attorneys.

P. O. address, 472 East Water St., corner of Oneida, Milwaukee, Milwaukee county, Wis.

15 Dated Milwaukee, May 16th, 1884.

D. G. ROGERS, *Of Counsel.*

Endorsed: Milwaukee county, *ss:* I certify that on the 17th day of May, 1884, at the city of Milwaukee, in said county, I served the within summons on the within-named defendant, "The Mutual Benefit Life Insurance Company," by delivering a copy thereof personally to & leaving the same with H. Nichols, the agent of said defendant at the said city of Milwaukee. Fees, $1.40. John Bentley, sheriff, by John W. Dunlop, under sheriff. Filed May 29, 1884. Christoph. Paulus, clerk.

Complaint on Policy No. 115,218.

County Court, Milwaukee County, Wisconsin.

KATHERINE SALENTINE, Plaintiff,

against

THE MUTUAL BENEFIT LIFE INSURANCE COMPANY, Defendant.

The plaintiff herein, by E. P. Smith & Nath. Pereles & Sons, her attorneys, complaining, alleges the following facts, constituting her cause of action against the above defendant:

I. That the defendant at the time of the transaction hereinafter set forth was, ever since has been, and still is a foreign corporation created and existing under and by virtue of the laws of the State of New Jersey and duly licensed to do business and to sue and be sued within this State.

16 II. That on the twentieth day of September, A. D. 1883, the said defendant, in consideration of the sum of eighty-three dollars and fifty-two cents to them in hand paid by the said plaintiff, wife of Peter Salentine, hereinafter named, residing in the city of Milwaukee, Wisconsin, and of the semi-annual premium of eighty-three and fifty-two hundredths dollars, to be paid on the twentieth day of September and the 20th day of March in every year during the continuance of this policy hereinafter named, did, by their agents, duly authorized thereunto, make and deliver to the plaintiff their certain policy of insurance of that date, and numbered 115,218, on the life of Peter Salentine, the husband of said plaintiff, who had a valuable interest in life of her said husband, wherein and whereby, for the consideration aforesaid, the said defendant did insure the life of the said Peter Salentine in the amount of three thousand dollars for the term of life, and did therein and thereby promise and agree to and with the said Katherine Salentine well and truly to pay or cause to be paid the said sum of three thousand dollars, at their office, in the city of Newark, to the said plaintiff within sixty days after due notice and satisfactory proof of the death of said Peter Salentine; and it was therein further promised and agreed by the

17 defendant that in case said assured should die before the decease of said insured, then the amount of said insurance should be payable to their children born of their marriage or to their guardian, if under age, or if their were no such children or their descendants living, then payable to the executors, administrators, or assigns of the said insured within sixty days after due notice and

satisfactory proof of interest and of the death of said insured, deducting therefrom all indebtedness of the party to the company, together with the balance, if any, of the then current year's premium.

III. That thereafter and on the 6th day of January, 1884, at the city of Milwaukee, the said Peter Salentine died, said policy then being in full force and operation, which death was not caused by or from the intemperate use of stimulants or narcotics, nor by his, the said Peter Salentine's, own hand, nor in consequence of the violation of any law or by the hands of justice, nor for any cause mentioned in said policy making the same void and of no effect.

IV. That the death of the said Peter Salentine was for causes within the true intent and meaning of said policy of insurance, and that said Peter Salentine and this plaintiff each duly fulfilled all the conditions of said policy of insurance on his and her part therein contained.

18 V. That due notice and satisfactory proof of the death of said Peter Salentine was by this plaintiff duly made and given and furnished to said defendant, as required by the terms of said policy and the rules of said company, within one year after his decease.

VI. That, although demanded, no part of said insurance has been paid, and said sum, with interest from the date of said proof, is now due thereon from the said defendant to this plaintiff.

VII. Wherefore the plaintiff demands judgment against said defendant for said sum of three thousand dollars and interest as aforesaid, together with costs and disbursements of this action.

E. P. SMITH,
NATH. PERELES & SONS,
Plaintiff's Attorneys.

D. G. ROGERS, *Of Counsel.*

STATE OF WISCONSIN, } ss.:
Milwaukee County, }

Katherine Salentine, the above-named plaintiff, being duly sworn, says she is such plaintiff; that the foregoing complaint is true to her own knowledge, except as to those matters therein stated on information and belief, and as to those matters she believes it to be true.

her
KATHERINE x SALENTINE.
mark.

Subscribed and sworn to before me this 26th day of May, A. D. 1884.

R. T. REUKEMA,
Notary Public, Milwaukee Co., Wis.

Endorsed: Filed May 29, 1884. Christoph. Paulus, clerk.

19 *Answer.*

County Court, Milwaukee County.

KATHARINE SALENTINE
against
THE MUTUAL BENEFIT LIFE INSURANCE COMPANY. } Suit on Policy No. 115,218.

The defendant in the above-entitled action, answering the complaint therein, admits that the defendant issued to the plaintiff a policy of insurance on the life of Peter Salentine, late husband of the plaintiff, as in the complaint alleged, and says that in said policy so issued it was expressly provided and stipulated that if said Peter Salentine, the insured, should die by his own hand said policy should be void. If, however, it should be shown that the insured at the time of taking his life was insane the company would pay the sum insured or refund the premiums actually received, with interest thereon, according to its judgment of the equities of the case, and it was expressly stipulated in said policy that such option was distinctly reserved by the company and made a part of the contract.

And this defendant, further answering, admits that said Peter Salentine died at the time mentioned in the complaint, but alleges that he died by his own hand; that he purposely, willfully, and knowingly took his own life. This defendant is informed and believes that the plaintiff claims that at the time said Peter Salentine so took his life he was insane. Whether or not he was in-

20 sane this defendant has no knowledge or information sufficient to form a belief; but this defendant says that the plaintiff prior to the commencement of this action, through her agent and attorney, made the claim that said Peter Salentine was insane when he took his life, and that this defendant thereupon, in accordance with the terms of said policy, elected, according to its judgment of the equities of the case, to repay to the plaintiff the sum insured, with interest thereon, and notified said plaintiff thereof, and offered to pay the same to the plaintiff, but that the plaintiff refused to accept the same; and this company does now elect and is ready and willing to repay to the plaintiff the premium actually received, with interest thereon.

The defendant, further answering, admits that it received, on or about the 28th day of January, 1884, notice and proof of the death of said Peter Salentine.

And, further answering, the defendant denies each and every allegation in the complaint contained not hereinbefore admitted.

JENKINS, WINKLER & SMITH,
Defendant's Attorneys.

MILWAUKEE COUNTY, *ss:*

F. C. Winkler, being duly sworn, says that he is one of the defendant's attorneys in this action; that none of the officers

21 of said defendant are within the State of Wisconsin; that de-

ponent verily believes the foregoing answer to be true, and his grounds of belief are a copy of the policy therein mentioned and information he has received, both from the defendant and from other persons, in reference to the death of the insured therein mentioned.

F. C. WINKLER.

Subscribed and sworn to before me this 16th day of June, 1884.

CHAS. E. WILD,
Notary Public, Milwaukee County, Wisconsin.

Endorsed. Filed June 26, 1884. Christoph. Paulus, clerk.

Petition for Removal.

THE STATE OF WISCONSIN:

County Court, Milwaukee County.

KATHERINE SALENTINE
vs.
THE MUTUAL BENEFIT LIFE INSURANCE COMPANY.

To the Hon. John E. Mann, the judge of said court:

The petition of the defendant above named respectfully shows that it is a citizen of the State of New Jersey, and that the plaintiff is a citizen of the State of Wisconsin; that the above-entitled action was commenced by the service of summons in said county on the 28th day of May, A. D. 1884; that this action is brought to recover of this defendant upon two certain policies of life insurance; that issue of fact was joined herein June 26, 1884; that the matter in dispute exceeds the sum or value of five hundred dollars, ex-
22 clusive of costs, and that the present September term of said court is the first term of said court at which said cause could be tried, and that it has not yet been tried; and your petitioner herewith presents its bond, with one good and sufficient surety, for its entering at the next term of the circuit court of the United States for the eastern district of Wisconsin, on the first day of its next session, a copy of the record in the above-entitled cause, copies of said process against petitioner, and of all pleadings, depositions, testimony, and other proceedings in the cause, and for the payment of all costs which may be awarded if said circuit court shall hold that this cause was wrongfully or improperly removed thereto, and also for their appearing and entering special bail in said suit if special bail was originally requisite therein; and your petitioner hereby offers to furnish such additional surety as this honorable court shall require.

Wherefore your petitioner prays this court to accept said petition

and bond and to proceed no further in this action, pursuant to the provisions of the acts of Congress in that behalf.

THE MUTUAL BENEFIT LIFE INSURANCE COMPANY,
By JENKINS, WINKLER & SMITH, *Its Attorneys.*

Endorsed: Filed Sept. 1, '84. Christoph. Paulus, clerk.

23 *Undertaking for Removal.*

Know all men by these presents that we, The Mutual Benefit Life Insurance Company, as principal, and Harrison Ludington, as surety, are held and firmly bound unto Katherine Salentine in the sum of five hundred dollars, to be paid to the said Katherine Salentine, her executors, administrators, or assigns; to which payment, well and truly to be made and done, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals the first day of September, A. D. 1884.

Whereas the above-bounden The Mutual Benefit Life Insurance Company has petitioned the county court of Milwaukee county, State of Wisconsin, for the removal of a cause therein pending, wherein Katherine Salentine is plaintiff and The Mutual Benefit Life Insurance Company is defendant, to the circuit court of the United States for the eastern district of Wisconsin pursuant to the provisions of the acts of Congress in that behalf:

Now, therefore, the condition of the above obligation is such that if the above-bounden The Mutual Benefit Life Insurance Company shall enter in such circuit court, on the first day of its next session, a copy of the record in such suit, copies of the process against petitioner, and of all the pleadings, depositions, testimony, and other proceedings in the cause, and shall pay all costs that may be
24 awarded by said circuit court if said court shall hold that such suit was wrongfully or improperly removed thereto, and shall also then and there appear and enter special bail in such suit if special bail was originally requisite therein, then this obligation shall be null and void; otherwise of force.

THE MUTUAL BENEFIT LIFE INSURANCE COMPANY, [SEAL.]
By JENKINS, WINKLER & SMITH,
Its Attorneys.
HARRISON LUDINGTON. [SEAL.]

In presence of—
JAS. G. JENKINS.
CHAS. E. WILD.

STATE OF WISCONSIN, }
Milwaukee County, } *ss:*

I, Harrison Ludington, of Milwaukee city, county of Milwaukee, and State of Wisconsin, the surety named in the foregoing bond, being duly sworn, do depose and say that I am a resident of the State of Wisconsin and a property-holder therein; that I am worth

the sum of five hundred dollars over and above all my debts and liabilities and exclusive of property by law exempt from execution.

HARRISON LUDINGTON.

Subscribed and sworn to before me this 1st day of September, A. D. 1884.

CHAS. E. WILD,
Notary Public, Wisconsin.

Endorsed: Filed Sept. 1, '84. Christoph. Paulus, clerk.

Order of Removal.

THE STATE OF WISCONSIN:

County Court, Milwaukee County.

KATHERINE SALENTINE
vs.
THE MUTUAL BENEFIT LIFE INSURANCE COMPANY.

25 Upon filing the petition of the Mutual Benefit Life Insurance Company for removal of above-entitled action to the circuit court of the United States for the eastern district of Wisconsin and the bond thereto attached, showing that all the proceedings for the removal of said above-entitled action into the circuit court of the United States for the eastern district of Wisconsin, pursuant to the statute in such case made and provided, have been taken, and that said suit is one proper for such removal, and on motion of Jenkins, Winkler & Smith, attorneys for the petitioner, it is hereby ordered that said suit be, and the same hereby is, removed into the circuit court of the United States for the eastern district of Wisconsin, and the clerk of this court is hereby directed to transmit and deliver to the clerk of the circuit court of the United States for the eastern district of Wisconsin copies of the record and of the process against said petitioner, and of all pleadings, depositions, testimony, and other proceedings in the cause above entitled, which consists of the two causes of the same title, heretofore consolidated by order of this court.

Dated Milwaukee, September 1, A. D. 1884.

By the court:

J. E. MANN,
County Judge.

Endorsed: Filed Sept. 1, '84. Christoph. Paulus, clerk.

26 County Court, Milwaukee County.

KATHARINE SALENTINE
vs.
THE MUTUAL BENEFIT LIFE INSURANCE COMPANY.

It is stipulated by and between the parties hereto that upon re-

moval of above cause into the United States court for eastern district of Wisconsin the clerk of above court may transmit all original records & files instead of certified copies thereof.

Dated Sept. 10, 1884.

E. P. SMITH, N. P. & SONS,
D. G. ROGERS, *Pl'ff's Att'ys.*
JENKINS, WINKLER & SMITH,
Def't's Att'ys.

Endorsed: Filed Sep. 11, 1884. Christoph. Paulus, clerk.

Action No. 1 *on Policy* 105,844.

KATHERINE SALENTINE *against* THE MUTUAL BENEFIT LIFE INSURANCE Company of New Jersey.	May Term, 1884. E. P. Smith & N. Pereles & Sons. Money Demand.

May 29, 1884.—And now comes the plaintiff in the above-entitled action, by Mess. E. P. Smith and Nath. Pereles & Sons, her attorneys, and files her summons, endorsed as follows:

Milwaukee county, *ss:* I certify that on the 17th day of May, 1884, at the city of Milwaukee, in said county, I served the within summons on the within-named defendant, "The Mutual Benefit Life Insurance Company," by delivering a copy thereof personally to and leaving the same with H. Nichols, the agent of said defendant
27 at said city of Wilwaukee. John Bentley, sheriff, by John W. Dunlop, under sheriff.

Same day.—Complaint filed.

June 26, 1884.—Answer filed; notice to consolidate actions filed.

June 28, 1884.—Affidavit and order to show cause filed.

And now comes the defendants, by Mess. Jenkins, Winkler and Smith, its attorneys, and moves to consolidate these actions, the plaintiff, by Mess. Nath. Pereles & Sons & E. P. Smith, in opposition thereto, and after hearing counsel said motion is granted with costs. Order filed.

Aug. 20, 1884.—Notice of trial & note of issue filed.

Sept. 1, 1884.—Petition for removal — undertaking for removal filed. Upon petition and undertaking herein filed and on motion of Jenkins, W. & Smith, attorneys for the petitioner, ordered that this action be, and hereby is, removed into the circuit court of the United States for the eastern district of Wisconsin. Order for removal filed.

Sept. 11, 1884.—Stipulation to transmit original papers, &c., to U. S. cir. c't, E. D. of Wis., filed.

Action No. 2 on Policy No. 115,218.

KATHARINE SALENTINE *against* THE MUTUAL BENEFIT LIFE Insurance Company of New Jersey.	May Term, 1884. E. P. Smith & N. Pereles & Sons. Money Demand.

May 29, 1884.—And now comes the plaintiff in the above-entitled action, by Mess. E. P. Smith and Nath. Pereles & Sons, her
28 attorneys, and files her summons, endorsed as follows:

Milwaukee county, *ss:* I certify that on the 17th day of May, 1884, at the city of Milwaukee, in said county, I served the within summons on the within-named defendant, "The Mutual Benefit Life Insurance Company," by delivering a copy thereof personally to and leaving the same with H. Nichols, the agent of said defendant at the said city of Milwaukee. Fees, $1.40. John Bentley, sheriff, by John W. Dunlop, under sheriff.

Same day.—Complaint filed.

June 26, 1884.—Answer filed.

June 28, 1884.—Affidavit and order to show cause filed in case 6811. And now comes the defendant, by Mess. Jenkins, Winkler and Smith, its attorneys, and moves to consolidate these actions, the plaintiff, by Nath. Pereles & Sons & E. P. Smith, in opposition thereto, and after hearing counsel said motion is granted with costs. (See order filed in 6811.)

THE STATE OF WISCONSIN:

County Court, Milwaukee County, *ss.*

KATHARINE SALENTINE, Plaintiff,
against
THE MUTUAL BENEFIT LIFE INSURANCE Co., Defendant.

MILWAUKEE COUNTY, *ss:*

I, Christoph. Paulus, clerk of the county court in and for
29 the county of Milwaukee and State of Wisconsin, do hereby certify that I have compared the foregoing copy with the original entries, and that the same is a true and correct transcript of the whole and every part of all entries, orders, and minutes in the books of the clerk in the above-entitled action, and that the process, pleadings, and other papers hereunto annexed are the originals and all the papers filed in the above-entitled action, and that the same are herewith transmitted to the United States circuit court of the eastern dist. of Wisconsin, pursuant to order of court made Sept. 1, 1884.

In testimony whereof I have hereunto set my hand and affixed

[SEAL.] the seal of said county court, at Milwaukee, the thirteenth day of September, A. D. 1884.

CHRISTOPH. PAULUS,
Clerk of the County Court, Milwaukee County, Wisconsin.

Endorsed: Filed October 6th, 1884. Edw. Kurtz, clerk.

Proceedings in U. S. Court.

December 20, 1884.—Plaintiff's notice of trial for January term, 1885, filed.

And afterwards, to wit, at a stated term of said court begun and held, according to law, at the city of Milwaukee on the first Monday (being the fifth day) of January, A. D. 1885, and on the sixty-
30 ninth day thereof, to wit, on the 30th day of March, A. D. 1885—present, the Hon. Charles E. Dyer, district judge, presiding, the following proceedings were had, to wit:

First Trial.

KATHARINE SALENTINE
vs.
THE MUTUAL BENEFIT LIFE INSURANCE COMPANY OF NEW JERSEY. } At Law.

This day came the parties, by their counsel—Messrs. E. P. Smith, T. J. Pereles, and D. G. Rogers appearing for the plaintiff and Mr. F. C. Winkler for the defendant—and the issues herein came on to be tried; whereupon a jury was called to try the same, who came, to wit, E. G. Hayden, John Lawton, George N. Wiswell, Hamilton Vose, William G. Taylor, Frank H. Birchard, Nathan Brick, Enoch Van Wie, Adam Truss, A. H. Cleveland, Daniel Waite, and John M. Furlong, twelve free, honest, and lawful men of the district, who were severally sworn and empannelled; and the trial not being concluded, the same was adjourned until to-morrow morning.

And afterwards, to wit, on the seventieth day of said term, to wit, on the 31st day of March, A. D. 1885, the following proceedings were had, to wit:

Verdict.

KATHARINE SALENTINE
vs.
THE MUTUAL BENEFIT LIFE INSURANCE COMPANY OF NEW JERSEY. } At Law.

31 This day came the parties, by their counsel, and also the said jurors of the jury, and the trial of the issue herein was resumed; and the jurors of the jury aforesaid, being charged by the

court, on their said oaths respectively, do say, in answer to the following questions propounded by the court, as follows, to wit:

1. Did the defendant, on the 19th day of September, 1881, issue the policy of insurance No. 105,844, for $2,000, on the life of Peter Salentine, described in the complaint and answer in this action?

Answer. Yes.

Q. Did the defendant, on the 20th day of September, 1883, issue the policy of insurance No. 115,218, for $3,000, on the life of Peter Salentine, described in the complaint and answer in this action?

Answer. Yes.

3. Did the said Peter Salentine, on the 6th day of January, 1884, take his own life?

Answer. Yes.

4. If he did, was he at the time insane?

Answer. Yes.

5. Was he morally responsible for the act?

Answer. Yes.

6. Did he at the time understand and know the physical consequences of the act?

Answer. Yes.

7. Was notice and proof of the death of said Peter Salentine
32 duly given and furnished to the defendant within the time required by said policies?

Answer. Yes.

8. What was the amount of the premiums paid by said deceased on said policy No. 105,844?

Answer. $272.80, which includes interest thereon to January 6, 1884.

9. What was the amount of the premiums paid by the deceased on said policy No. 115,218?

Answer. $59.51, which includes interest to January 6, 1884.

10. Had all premiums on each and both of said policies been paid at the time of the death of said Peter Salentine?

Answer. Yes.

11. What is the total amount of the premiums so paid on both policies, with interest, at 7 per cent., added from the 6th day of January, 1884, to the present date?

Answer. $361.06.

12. Did the defendant, before the commencement of this suit, notify the plaintiff that it would only refund the premiums received by it from the deceased on policy No. 115,218; and, if so, when?

Answer. Yes; on May 5, 1884.

13. Did the defendant, on the 14th of March, 1884, notify its local agent at Milwaukee that it had concluded to repay the premiums paid, with interest, on the policies in suit by letter of that date?

Answer. Yes.

33 And the said jurors of the jury do further say, by direction of the court, that they find for the plaintiff, and assess her damages at three hundred and sixty-one dollars and six cents.

And afterwards, to wit, on the one hundred and twelfth day of said term, to wit, on the 17th day of June, A. D. 1885, the following proceedings were had, to wit:

KATHERINE SALENTINE
vs.
THE MUTUAL BENEFIT LIFE INSURANCE COMPANY OF NEW JERSEY. } At Law.

This day came the plaintiff, by her counsel, and moved the court to set aside the verdict of the jury and for a new trial for reasons filed, as follows:

Motion for New Trial.

United States Circuit Court, Eastern District of Wisconsin.

KATHERINE SALENTINE, Plaintiff,
against
THE MUTUAL BENEFIT LIFE INSURANCE COMPANY, Defendant.

Now comes the above-named plaintiff, by E. P. Smith and Nath. Pereles & Sons, her attorneys, and moves the court, now here, to set aside the verdict of the jury and grant a new trial in the above action for the reason that said verdict is contrary to the law and the evidence in the case, and that the court erred in overruling plaintiff's objections to testimony offered and received upon the
34 part of defendant on said trial and excepted to by the plaintiff.

Dated Milwaukee, June 17, 1885.

E. P. SMITH,
NATH. PERELES & SONS,
Plaintiff's Attorneys.

And afterwards, to wit, at a stated term of said court, begun and held, according to law, at the city of Milwaukee, on the first Monday (being the fourth day) of October, A. D. 1886, and on the thirteenth day thereof, to wit, on the 17th day of February, A. D. 1886—present, the Hon. Walter Q. Gresham, circuit judge, presiding, and the Hon. Charles E. Dyer, district judge—the following proceedings were had, to wit:

KATHERINE SALENTINE
vs.
THE MUTUAL BENEFIT LIFE INSURANCE COMPANY OF NEW JERSEY. } At Law.

This day came the parties, by their counsel, and the motion of the plaintiff for a new trial came on to be heard, and was argued by Mr. E. P. Smith on behalf of the plaintiff and by Mr. John T. Fish for the defendant, in opposition, and submitted, when the court took the same under consideration.

And afterwards, to wit, on the ninety-seventh day of said term, to wit, on the 11th day of June, A. D. 1886—present, the said Hon. Walter Q. Gresham, circuit judge, presiding, and the Hon.
35 Charles E. Dyer, district judge—the following proceedings were had, to wit:

Order Granting New Trial.

KATHERINE SALENTINE
vs.
THE MUTUAL BENEFIT LIFE INSURANCE COMPANY OF NEW JERSEY. } At Law.

This day came the parties, by their counsel, and, on consideration of the motion of the plaintiff for a new trial and the arguments of counsel thereon, it is ordered by the court that a new trial be, and hereby is, granted.

And afterwards, to wit, at a stated term of said court begun and held, according to law, at the city of Oshkosh, in said district, on the second Tuesday (being the 13th day) of July, A. D. 1886, and on the third day of said term, to wit, on the 15th day of July, A. D. 1886—present, the Hon. Walter Q. Gresham, circuit judge, presiding, and the Hon. Charles E. Dyer, district judge—the following proceedings were had, to wit:

Second Trial.

KATHERINE SALENTINE
vs.
THE MUTUAL BENEFIT LIFE INSURANCE COMPANY OF NEW JERSEY. } At Law.

This day came the parties, by their counsel—Mr. E. P. Smith appearing for the plaintiff and Mr. John T. Fish for the de-
36 fendant—and the issues herein came on to be tried, when the parties entered into an agreement in writing waiving a jury, as herein filed, as follows, to wit:

Stipulation Waiving Jury.

United States Circuit Court, Eastern District of Wisconsin.

KATHERINE SALENTINE
vs.
THE MUTUAL BENEFIT LIFE INSURANCE COMPANY OF NEW JERSEY.

It is hereby stipulated and agreed by and between the parties in above suit that a trial by jury be waived therein, and that the issues of fact therein be tried and determined by the court upon the evi-

dence without the intervention of a jury, at this July term, without further notice.

Dated July 15, 1886.

JENKINS, WINKLER & SMITH,
Plaintiff's Attorneys.
E. P. SMITH AND
NATH. PERELES & SONS,
Defendant's Att'ys.

Finding.

And the said issues were thereupon tried by the court and submitted by said counsel upon the pleadings and evidence; on consideration whereof the court find that the plaintiff is entitled to recover under policy No. 105,844 of the defendant the sum of three hundred and ten dollars and ninety-two cents ($310.92), being the amount of premiums actually paid thereon, with interest to this date; and, further, pursuant to the opinion of the circuit judge, that the plaintiff is also entitled to recover of the defendant, in addition to the amount above stated, the further sum of three
37 thousand four hundred and thirteen dollars and fifty cents, being the amount insured by policy No. 115,218, with interest to this date. The said judges being divided in opinion thereon a certificate of such division is filed.

Judgment.

Whereupon it is considered and adjudged by this court now here that the said plaintiff do have and recover of the said defendant, The Mutual Benefit Life Insurance Company of New Jersey, the said sums of three hundred and ten dollars and ninety-two cents and three thousand four hundred and thirteen dollars and fifty cents, amounting in all to three thousand seven hundred and twenty-four dollars and forty-two cents, together with sixty-one dollars and fifty-eight cents, her costs about her said suit in this behalf by her expended, and that she have execution therefor.

Judgment-roll signed July 15th, A. D. 1886.

EDWARD KURTZ, *Clerk.*

Damages	$3,724 42
Costs	61 58
	$3,786 00

And which said certificate of division of opinion of said judges is as follows, to wit:

Certificate of Division.

At a stated term of the United States circuit court for the eastern district of Wisconsin, begun and held at the court-room, in the city of Oshkosh, within said district, on the first Monday in July,

38 A. D. 1885, to wit, on the 15th day of July, A. D. 1885, during said term.

Present: Hon. Walter Q. Gresham, circuit judge; Hon. Charles E. Dyer, district judge.

KATHERINE SALENTINE, Plaintiff,
vs.
THE MUTUAL BENEFIT LIFE INSURANCE COMPANY OF NEW JERSEY, Defendant.

This case having been brought on for hearing and trial before the court without a jury, a trial by jury having been waived by the written stipulation of the attorneys in the suit herein of the above parties, and said stipulation having been duly filed with the clerk of this court as by statute made and provided, and the proofs and allegations of the respective parties and the arguments herein having been heard, the court now here decides and finds as facts established by said evidence as follows:

First. That said defendant, The Mutual Benefit Life Insurance Company of New Jersey, on the 19th day of September, 1881, through its local agent at Milwaukee, Wisconsin, issued policy of insurance No. 105,844 to the plaintiff, the wife of Peter Salentine, for two thousand dollars ($2,000) on the life of said Peter Salentine, of Milwaukee aforesaid, described in the complaint and answer in this action, a copy of which policy is hereto annexed and marked "Exhibit A."

39 Second. That said defendant, on the 20th day of December, 1883, issued, through its local agent aforesaid at Milwaukee, policy of insurance No. 115,218 to the said plaintiff, wife of Peter Salentine, for three thousand dollars ($3,000) on the life of the said Peter Salentine, described in the complaint and answer in this action, a copy of which policy is hereto annexed and marked "Exhibit B;" that in and by said policy the said defendant agreed and promised the assured well and truly to pay or cause to be paid the said sum insured at their office, in the city of Newark, to the said assured within sixty days after due notice and satisfactory proof of the death of said insured. Said policy was issued and accepted by the assured upon the following condition, among others therein stated, to wit:

"That if the death of the insured shall result from the intemperate use of stimulants or narcotics, or if he shall die by his own hand or in consequence of a violation of any law, or by the hands of justice, this policy shall be void. If, however, it shall be shown that the insured at the time of taking his life was insane the company will pay the sum insured or refund the premiums actually received, with interest thereon, according to its judgment of the equities of the case. This option is distinctly reserved by the company and is made a part of this contract."

40 Third. That said policies being in full force, the said Peter Salentine, on the 6th day of January, 1884, at Milwaukee aforesaid, took his own life.

Fourth. That he so took his own life while insane.

Fifth. That the said Peter Salentine, at the time he so died by his own hand, was insane and was not morally responsible for the act.

Sixth. That at that time he knew the physical consequences of the act.

Seventh. That notice and proof of his death as aforesaid was duly given and furnished to said company on each of said policies on the 28th day of January, 1884, and within the time required by said policies, a copy of which notice and proof is hereto annexed and marked "Exhibit C."

Eighth. That, as a part of said proof and in accordance with the requirements of said company, the said assured at the same time furnished and delivered to said company a duly certified copy of the coroner's inquest, taken at Milwaukee on the 7th day of January, 1884, before the coroner in and for said county, upon the body of said Peter Salentine, together with the evidence given before said coroner and jury; which inquest, after reciting such evidence, was as follows:

"STATE OF WISCONSIN, }
"*Milwaukee County*, } *ss:*

"An inquisition taken at Milwaukee, in the county of Mil-
41 waukee, on the 7th day of January, 1884, before me, Charles Kuepper, coroner in and for said county, upon the view of the body of Peter Salentine, about fifty-five years old, there dead, by the jurors, whose names are hereunto subscribed, who, being duly sworn to inquire on behalf of the people of this State when, in what manner, and by what means the said Peter Salentine came to his death, upon their oath do say that the said Peter Salentine, on the 6th day of January, 1884, came to his death by hanging himself in a tin shop in the yard of his house, 315 Third avenue, eighth ward, while laboring under a fit of insanity.

"In testimony whereof said coroner and jury of this inquest have hereunto set their hands and seals the day and year aforesaid."

Which inquisition was signed by the said jurors as well as by the said coroner, as by statute provided, and the seal of said coroner attached thereto on the 7th day of January, 1884.

Ninth. That the defendant, on the 14th day of March, 1884, notified its said local agent at Milwaukee, by letter, that it had decided that the case of the loss under said policies came under the insane clause, and that the premiums, with interest, should be paid to the claimant. A copy of said letter is hereto annexed and marked "Exhibit 1."

Tenth. That no notice of the contents of said letter was
42 given to the said plaintiff, the assured named in said policies.

Eleventh. That afterwards, on April 26th, 1884, the said local agent wrote and sent to the defendant a letter of that date, of which a copy is hereto annexed and marked "Exhibit 1½," stating that the parties having charge of the Salentine claim here wished to know what the company proposed to do in the case, and that he

could give them no answer and asking what answer, if any, he should give them; that on the 29th day of April, 1884, the said defendant wrote to its local agent that on the 14th of March the defendant had communicated to him the action of the directors in regard to said policies, and that there could be no change in the terms of settlement proposed. A copy of said letter is hereto annexed and marked "Exhibit 2." That on the 28th day of April, 1884, Christian Salentine, the agent of the plaintiff, wrote and sent to the defendant a letter of that date asking for information why payment had not been made on the said policies, a copy of which letter is hereto annexed and marked "Exhibit 3;" that the defendant thereupon and thereafter sent to its said local agent at Milwaukee a letter dated May 1st, 1884, a copy of which is hereto annexed and marked "Exhibit 4," enclosing statement of account and temporary receipt, in case of loss under said policies to be used in case of settlement, and
43 enclosing a letter of the same date from the defendant, addressed to Christian Salentine, with orders to forward the same to him, which letter, after the date and address, was in the language following:

"Your favor of the 28th ult. is received. We have communicated to our agent, Mr. Nichols, the action of our directors on the two policies on life of Mr. Peter Salentine, and the information should have been given to claimants before now. The policies are entirely different from those paid by the other companies and we pay them according to the express terms under which they were issued.

"Yours truly, EDWIN L. DOBBINS, *Sec'y.*"

Twelfth. That on the 5th day of May, 1884, said letter so addressed to Christian Salentine was delivered to him and he notified for the first time of the said decision of the defendant as contained in their said letter of March 14th, 1884; that he then and there, on behalf of the plaintiff, refused to accept repayment of the premiums and the interest, but demanded of the local agent payment of the amounts insured in full.

Thirteenth. That said defendants have made no payment of any amount stated in said policies or tender of payment to the said plaintiff.

Fourteenth. That the amount of premiums paid by said deceased on said policy No. 105,844 was as follows:

44	September 19, 1881	$97 00
	" 1882	76 42
	September 19, 1883	78 16

That the amount of interest at six per centum on the same from the respective dates of each payment to the 15th day of July, 1886, is $58.94, making a total of $310.92 now due the plaintiff on said policy from the said defendant.

Fifteenth. That the amount of premiums paid by said deceased upon policy No. 115,218 were as follows:

	September 20, 1883	$58 47

That the amount of interest at six per centum on the same from the date of said payment to the 15th day of July, 1886, is $9.89, being a total of sixty-eight dollars and thirty-six cents.

Sixteenth. That the interest upon the sum insured by policy No. 115,218 from March 30, 1884, to the 15th day of July, 1886, at the rate of six per centum, amounts to $413.50, making the whole amount so insured, with interest to said date, three thousand four hundred and thirteen dollars and fifty cents.

Seventeenth. That none of the sums hereinbefore stated or any part thereof have been paid by the said defendant.

Upon the foregoing facts the following are the conclusions of law:

First. The plaintiff is entitled to recover, under policy No.
45 105,844, of the defendant the sum of three hundred and ten dollars and ninety-two cents ($310.92), being the amount of premiums actually paid thereon, with interest to this date, as found by the fourteenth finding of fact herein.

In this conclusion the said circuit and district judges concur.

Second. The plaintiff is also entitled to recover of the defendant, in addition to the amount above stated, the further sum of three thousand four hundred and thirteen dollars and fifty cents ($3,413.50), being the amount insured by policy No. 115,218, with interest to this date, as found by the sixteenth finding of fact herein.

The second conclusion of law is established on the facts so found in the opinion of the said circuit judge, who is opposed in said conclusion and opinion by the said district judge, said circuit judge being of opinion that on the facts found the plaintiff is entitled to recover on policy No. 115,218 the amount insured, three thousand dollars, with interest, and the district judge being of opinion that the plaintiff is entitled to recover on said policy only the amount of premium paid thereon, with interest to this date, amounting to $68.36.

It is therefore, by request of both parties hereto, ordered that the said question, as to said second conclusion of law, be certified
46 to the Supreme Court of the United States—that is to say, Was and is the plaintiff entitled to recover the said sum of three thousand dollars so insured by said policy No. 115,218, with interest as aforesaid, or only entitled to recover on said policy said premium, with interest as aforesaid?

(Signed) WALTER Q. GRESHAM,
Circuit Judge.

" CHAS. E. DYER,
Dist. Judge.

47 EXHIBIT A.

Not assignable.

The Mutual Benefit Life Insurance Company, incorporated by the State of New Jersey.

[Vignette.]

No. 105,844. $2,000.

This policy witnesseth that the Mutual Benefit Life Insurance Company, in consideration of the representations made to them in the application for this policy and in the declaration subjoined thereto, and of the sum of ninety-seven dollars and forty cents to them in hand paid by Mrs. Katherine Salentine, wife of Peter Salentine, and of the — annual premium of ninety-seven dollars and forty cents, to be paid at or before twelve o'clock m. on the nineteenth day of September in every year during the continuance of this policy, do insure the life of Peter Salentine, of Milwaukee, in the county of Milwaukee, State of Wisconsin, in the amount of two thousand dollars for the term of life.

— annual premium, $97.40.

And the said company do hereby promise and agree to and with the said assured well and truly to pay or cause to be paid the said sum insured, at their office, in the city of Newark, to the said Katherine Salentine within ninety days after due notice and satisfactory proof of the death of the said Peter Salentine; and in case the said assured should die before the decease of the said Peter Salentine, then the amount of this insurance shall be payable to their children or to their guardian, if under age, within ninety days after due notice and satisfactory proof of interest and of the death of the said Peter Salentine, deducting therefrom all indebtedness of the party to the company, together with the balance, if any, of the year's premium.

Provided always, and it is hereby declared to be the true intent and meaning of this policy, and the same is accepted by the assured upon these expressed conditions, namely, that the limits of residence and travel include those parts of the settled limits of the United States and British possessions in North America which lie between the parallels of 50° and 33° north latitude, and voyages as passenger to and from all ports within said limits at all seasons of the year, and travel to or residence in that part of the United States south of the parallel of 33° between the first day of November and the first day of July; that voyages may be made as passenger by first-class vessels to and from all ports within the above limits, to and from California, either via the Isthmus of Panama or around Cape Horn; to and from Japan, with residence there; to and from Europe, with residence in any part thereof; and that in case the insured shall pass beyond the limits above named without the written consent of the company previously obtained, or shall be personally engaged in blasting, mining, submarine operations, or the production of

highly inflammable or explosive substances; or in working or managing a steam-engine in any capacity; or enter as mariner, engineer, fireman, conductor, or laborer in any capacity upon service on any sea, sound, inlet, river, lake, or railroad, or into any military or naval service whatsoever (the militia in time of peace excepted); or in case he shall die by his own hand, or in, or in consequence of a duel, or by reason of intemperance from the use of intoxicating liquors or narcotics, or by the hands of justice, or in violation of any law of the United States, or of any one of said States, or of any other country which he may be permitted under this policy to visit or reside in, this policy shall be void, null, and of no effect, except that in case he shall die by his own hand while insane the amount to be paid by the company on this policy shall be the amount of the premiums actually paid thereon, with interest.

And it is also understood and agreed by the within assured to be the true intent and meaning hereof that the statements contained in the application for this policy and the declaration subjoined thereto, on the faith of which statements this contract is made, are warranted to be true, and that if said statements or any of them shall be found to be untrue, then and in such case this policy shall be null and void; or in case the said premiums (the party whose life is insured being living) shall not be paid on or before the several days hereinbefore mentioned for the payment thereof, at the office of the company, in the city of Newark, or to agents when they produce receipts signed by the president or treasurer, then and in every such case the said policy shall cease and determine; but when after two full annual premiums shall have been paid on this policy it shall cease or become void solely by the non-payment of any premium when due, its entire net reserve by the American experience mortality and interest at four per cent. yearly, less any indebtedness to the company on this policy, shall be applied by the company as a single premium at the company's rates published and in force at this date, either, first, to the purchase of non-participating term insurance for the full amount insured by this policy, or, second, upon the written application by the owner of this policy and the surrender thereof to the company at Newark within three months from such non-payment of premium, to the purchase of a non-participating paid-up policy payable at the time this policy would be payable if continued in force. Both kinds of insurance aforesaid will be subject to the same conditions, except as to payment of premiums, as those of this policy. No part, however, of such term insurance shall be due or payable unless satisfactory proofs of death be furnished to the company within one year after death; and if death shall occur within three years after such non-payment of premium and during such term of insurance, there shall be deducted from the amount payable the sum of all the premiums that would have become due on this policy if it had continued in force.

This policy does not take effect until the premium is paid; nor are agents authorized to make, alter, or discharge contracts, or waive forfeitures, or grant permits, or to receive for the cash due for premiums anything but cash.

In witness whereof the said The Mutual Benefit Life Insurance Company have, by their president and secretary, signed and delivered this contract, at the city of Newark, in the State of New Jersey, this nineteenth day of September, one thousand eight hundred and eighty-one.

LEWIS C. GROVER, *President.*

EDWARD L. DOBBINS, *Secretary.*

C.

48 Ex. B.

Not assignable.

The Mutual Benefit Life Insurance Company, incorporated by the State of New Jersey.

[Vignette.]

No. 115,218. $3,000.

This policy witnesseth that the Mutual Benefit Life Insurance Company, in consideration of the statements and agreements in the application for this policy and in the declaration subjoined thereto, which are hereby made a part of this contract, and of the sum of eighty-three dollars and fifty-two cents, to them in hand paid by the assured, Mrs. Katharine Salentine, wife of the insured, Peter Salentine, and of the semi-annual premium of eighty-three dollars and fifty-two cents, to be paid at or before twelve o'clock m. on the twentieth day of September and March in every year during the continuance of this policy, do insure the life of Peter Salentine, of Milwaukee, in the county of Milwaukee, State of Wisconsin, in the amount of three thousand dollars for the term of life.

Semi-annual premium, $83.52.

And the said company do hereby promise and agree to and with the said assured well and truly to pay or cause to be paid the said sum insured, at their office, in the city of Newark, to the said assured within sixty days after due notice and satisfactory proof of the death of the said insured; and in case the said assured shall die before the decease of the said insured then the amount of this insurance shall be payable to the children born of their marriage or to their guardian, if under age, or, if there are no such children or their descendants living, then payable to the executors, administrators, or assigns of the said insured within sixty days after due notice and satisfactory proof of interest and of the death of the said insured, deducting therefrom all indebtedness of the party to the company, together with the balance, if any, of the then current year's premium.

This policy is issued and is accepted by the assured upon the following conditions, namely:

That the insured will reside in those parts of the United States only that lie at least one hundred miles from the Gulf of Mexico or in the Dominion of Canada or in Europe or in Japan, and not elsewhere without written permission of the company, first obtained.

That for three years from the date hereof the insured shall be restricted in traveling to points within and to voyages between the above limits. After that period journeys for business or pleasure may be made without restriction.

That he will not at any time within three years from the date hereof be personally engaged in any blasting, mining, or submarine operation or in the production of any highly inflammable or explosive substance, or in working or managing a steam engine or boiler, or be employed in any manner on a railway train or on a steam or sailing vessel.

That he will not engage in any military or naval service, unless it be in the militia in time of peace.

That any violation of either of the above conditions without the written permission of the company, previously obtained, shall render this policy void.

That the statements contained in the said application and declaration and every of them are true, and if any of them shall be found untrue then this policy shall be null and void; but that after three years from the date hereof this policy shall not be thereby rendered void unless such erroneous statement or statements shall be shown to be material and to have been made with intent to deceive or defraud the company. Any error made in understating the age of the insured will be adjusted by paying such amount as the premiums paid would purchase at the table rate.

That if the death of the insured shall result from the intemperate use of stimulants or narcotics, or if he shall die by his own hand or in consequence of a violation of any law, or by the hands of justice this policy shall be void. If, however, it shall be shown that the insured at the time of taking his life was insane the company will pay the sum insured or refund the premiums actually received, with interest thereon, according to its judgment of the equities of the case. This option is distinctly reserved by the company and is made a part of this contract.

That in case the said premiums (the party whose life is insured being living) shall not be paid on or before the several days hereinbefore mentioned for the payment thereof, at the office of the company, in the city of Newark, or to agents when they produce receipts signed by the president or treasurer, then and in every such case the said policy shall cease and determine; but when after two full annual premiums shall have been paid on this policy it shall cease or become void solely by the non-payment of any premium when due its entire net reserve by the American experience mortality and interest at four per cent. yearly, less any indebtedness to the company on this policy, shall be applied by the company as a single premium at the company's rates published and in force at this date either, first, to the purchase of non-participating term insurance for the full amount insured by this policy or, second, upon the written application by the owner of this policy and the surrender thereof to the company at Newark within three months from such non-payment of premium, to the purchase of a non-participating paid-up policy payable at the time this policy would be payable if

continued in force. Both kinds of insurance aforesaid will be subject to the same conditions, except as to the payment of premiums, as those of this policy. No part, however, of such term insurance shall be due or payable unless satisfactory proofs of death be furnished to the company within one year after death, and if death shall occur within three years after such non-payment of premium and during such term of insurance there shall be deducted from the amount payable the sum of all the premiums that would have become due on this policy if it had continued in force.

This policy does not take effect until the premium shall have been actually paid, nor are agents authorized to make, alter, or discharge this or any other contract in relation to the matter of this insurance, or to waive any forfeiture hereof, or to grant permits or to receive for the cash due for premiums anything but cash.

In witness whereof the said The Mutual Benefit Life Insurance Company have, by their president and secretary, signed and delivered this contract, at the city of Newark, in the State of New Jersey, this twentieth day of September, one thousand eight hundred and eighty-three.

AMZI DODD, *President.*

EDWARD L. DOBBINS, *Secretary.*

[Form 2.]

49 Ex. C.

The Mutual Benefit Life Insurance Company, 752 Broad street, Newark, N. J.

Proof from Claimant, Whether Executor, Administrator, Wife, Children, Guardian, or Trustee.

Katherine Salentine, of Milwaukee, in the State of Wisconsin, of full age, being sworn, depose- and say- that deponent is the holder and owner of policies No-. 105,844 and 115,218, dated Sept. 19th, 1881, and Sept. 20th, 1883, respectively, for $2,000 and $3,000 *dollars*, respectively, issued by the Mutual Benefit Life Insurance Company on the life of Peter Salentine, deceased; and I, deponent, claim that the said deceased did not violate any of the conditions of said policies; that deponent has a good and valid interest in said policies to the amount of $5,000.00, and that she is legally entitled to receive the same as the beneficiary named in said policies of said deceased.

her
KATHERINE x SALENTINE.
mark.

Signed in presence of—
CHAS. D. MANN.
CHR. SALLENTINE.

Sworn before me this 22d day of January, 1884.

CHAS. D. MANN,
Notary Public, Wis.

[NOTARIAL SEAL.]

Proof from Assignee.

—— ——, of ——, in the State of ——, of full age, being sworn, depose- and say- that —— ——, the assignee of polic- No-. — —, dated —— —, 18–, for — dollars, issued by the Mutual Benefit Life Insurance Company on the life of —— ——, deceased; and —, deponent, claim that the said deceased did not violate any of the conditions of said polic-.

Deponent further say- that the assignment of said polic- was made to —— ——, by —— —— on the — day of ——, 18–, and was in consideration of —.

[Written across the face in red ink:] Policies unassigned.

50 *Medical Proof of Loss and Cause of Death.*

The undersigned was the attending physician in the last sickness of —— ——, in the State of ——, who died at ——, in the State of ——, on the — day of ——, 188–.

And, for further information of the company, the undersigned answers as follows:

How long have you known deceased?	
How long have you been the attending or family physician?	
A. Were you his attending physician prior to his last illness? B. If so, state, as near as you can, the time and the disease for which you treated him.	A. B.
A. Had deceased, to your knowledge, been attended by any other physician? B. If so, when, by whom, and for what disease?	A. No attending physician in the last sickness. B. Certified copy of coroner's inquest furnished.
When did he show the first symptom of his final illness?	

A. What was the date of your first visit?	A.
B. Your last visit?	B.
Of what disease did he die?	
What were the general symptoms present during the progress of his disease?	
What causes, in your opinion, operated to produce the disease or diseases of which he died?	
A. Was the deceased, to your knowledge, afflicted with any other disease or affection, acute or chronic?	A.
B. If so, give date and character of same clearly.	B.
C. Also state whether it caused or hastened death.	C.
A. Was the deceased in the habit of using spirituous liquors?	A.
B. Opium?	B.
C. Chloral?	C.
D. To what extent?	D.
A. Was a post-mortem examination made?	A.
B. By whom and with what results?	B.
State any other facts known to you regarding the character and duration of the fatal illness.	

—— ——, *M. D.*

Personally appeared before me the above-named Dr. —— ——, known to me to be a physician in good and regular standing in his profession, and made oath that the foregoing statements and answers by him made are true to the best of his knowledge and belief.

Sworn and subscribed this — day of ——, 188–, at ——.

—— ——.

51 *Certificate of Officiating Clergyman.*

I, —— ——, do hereby certify that I am — minister of the —— church at ——, and that I officiated in my clerical capacity on the — day of ——, 188–, at the funeral of —— ——, who died at ——, on the — day of ——, 188–.

—— ——.

Sworn and subscribed before me this — day of ——, 188–.

—— ——.

[Written across the face in red ink:] No clergyman.

Undertaker's Certificate.

I, Charles Messmann, do hereby certify that I am an undertaker, residing at Milwaukee, Wisconsin, and as such undertaker I attended the funeral of Peter Salentine, and that he was interred in Calvary cemetery on the 9th day of January, 1884.

C. MESSMAN.

Sworn and subscribed before me this 22d day of January, 1884, at Milwaukee.

CHAS. D. MANN, [NOTARIAL SEAL.]
Notary Public, Wis.

Proof of Identity and Age.

I, Christian Salentine, do hereby certify that I was personally acquainted with Peter Salentine, who died on the 6th day of January, 1884; that he was the identical person insured in The Mutual Benefit Life Insurance Company, under policies No. 105,844 and 115,218; that his age at the time of his death was about 54 years, the date of his birth being unknown to me, and that my knowledge of his age is obtained from *my knowledge of my own age, he being my brother & about 5 years younger than myself. There is no family record, to my knowledge.

CHR. SALLENTINE.

Sworn and subscribed before me this 22d day of January, 1884, at Milwaukee.

CHAS. D. MANN,
Notary Public.

52 [Endorsed:] Copy. Loss No. 9078. Policy Nos. 105,844, 115,218. Amount, $5,000. The Mutual Benefit Life In-

* This blank should be filled, if possible, from the family record.

☞ The official character of the officer before whom the affidavits are made must be certified to in all cases.

surance Company, Newark, N. J. Proofs of loss on life of Peter Salentine. Submitted to the company for examination and approval January 28th, 1884. All claims are payable at the company's office, in Newark, N. J., after completion and approval of proofs and on return of the policies duly receipted by the legal owners thereof.

Notice to Claimants.

1. When the policy is payable to representatives of the party insured the claim must be made by the executor or administrator of the deceased and a certified copy of letters testamentary or of administration must accompany the proof papers. Trustees, unless named in the policy, must send their authority.

2. When a policy has been assigned the assignee will make the claim, accompanied by the original assignment or an authenticated copy of the same and a sworn statement of interest, and the original must be lodged with the company at or before the settlement of the claim.

3. When the policy is payable to the wife of the insured or to any other person or persons she or they will make the claim. If the death of the wife should occur before that of the husband an affidavit* of some person cognizant of the fact must accompany the proofs, giving the date of her death; also giving the name and the date of birth of each and every of the children; and for such as are minors a guardian must be appointed by the court and a certified copy of letters of guardianship must be filed with the proofs. If children have died leaving heirs, the names, ages, &c., of such heirs must be furnished.

4. When a coroner's inquest was held a certified copy of the inquest must accompany the proofs.

5. A certificate to the authority of the officer before whom the several statements are sworn must in all cases be attached.

53 DEFT'S EXHIBIT NO. 1.

NEWARK, N. J., *M'ch 14th*, 1884.

Mr. Henry Nichols, Milwaukee, Wis.

DEAR SIR: At the meeting of the directors yesterday the case of loss under policies Nos. 105,844 & 115,218, Salentine, was fully considered, and it was decided that the case came under the insane clause of the policies, and that the premiums, with interest, should be paid to the claimant. In case of policy No. 105,844 the amount for the company to pay is $272.80 and on policy No. 115,218, $59.50.

The contract in the policies is so clear and unmistakable that no sound, intelligent lawyer can advise, we think, any contest thereon.

Yours truly,

(Signed) EDWARD L. DOBBINS, *Sec'y.*

* Blank form of affidavit will be furnished by the company.

EXHIBIT 1½.

MILWAUKEE, 4, 26, 1884.

Mutual Benefit Co.

GENTS: The parties having charge of the Salentine claim here wish to know what the Co. propose to do in the case & I can give them no answer. What answer, if any, shall I give them? The other companies interested have paid their claims in full, they inform me.

Yours truly, H. NICHOLS.

P. S.—Please forward permit for Thos. Fagan, No. 115,397, to visit Palestine, Egypt.

H. N.

54 EXHIBIT 2.

NEWARK, N. J., *Ap'l.* 29, 1884.

Mr. Henry Nichols, Milwaukee, Wis.

DEAR SIR: Your favor of 26th inst. is received. On the 14th of March we communicated to you the action of our directors in regard to policies No. 105,844 and No. 115,218, on the life of Peter Salentine. There can be no change in the terms of settlement proposed, which are in exact accordance with the terms of the policies. The fact that other policies have been paid by companies under different contracts cannot affect the action of this company.

Yours truly, EDWARD L. DOBBINS, *Sec'y.*

EXHIBIT 3.

MILWAUKEE, *April 28th*, 1884.

Mutual Benefit Life Insurance Co., Newark, N. J.

GENTLEMEN: Not having received a satisfactory answer from your local agent here, I take the liberty to address a few lines to you for information why the payment has not been made on the life of Peter Salentine, being that the other companies have paid over one month ago. Please advise at once and oblige,

Very resp. yours, CHR. SALLENTINE.

55 EXHIBIT 4.

NEWARK, N. J., *May 1st*, 1884.

Mr. Henry Nichols, Milwaukee, Wis.

DEAR SIR: We enclose statement of account and temporary receipt in case of loss under policies No. 105,844 & No. 115,218, Salentine. The policies & this account should be returned to us duly receipted, with the 1883 renewal of No. 105,844. We also enclose letter addressed to Christian Sallentine, which please forward.

Yours, truly, EDWARD L. DOBBINS, *Sec'y.*

September 20, 1886.—This day came the defendant, by its attorneys, and filed the bond of said defendant in the sum of seven

thousand six hundred dollars, with Amzi Dodd and Frederick H. Teese as sureties, conditioned that it shall prosecute a writ of error to effect and answer all damages and costs if it fail to make its plea good; which bond is approved by the district judge, and is as follows, to wit:

Supersedeas Bond.

Know all men by these presents that we, The Mutual Benefit Life Insurance Company of the city of Newark, State of New Jersey, as principal, and Amzi Dodd and Frederick H. Teese, both of the city of Newark, in the State of New Jersey, as sureties, are held and firmly bound unto Katharine Salentine, of the city of Milwaukee, State of Wisconsin, in the sum of seven thousand six
56 hundred dollars, lawful money of the United States of America, to be paid to the said Katharine Salentine or to her certain attorneys, heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the seventeenth day of September, in the year of our Lord one thousand eight hundred and eighty-six.

The condition of this obligation is such that whereas lately, at a term of the circuit court of the United States of America for the eastern district of Wisconsin, held at the city of Milwaukee, in said district, on the 15th day of July, A. D. 1886, in a suit depending in said court between Katharine Salentine, plaintiff, and The Mutual Benefit Life Insurance Company, defendant, judgment was rendered against the said The Mutual Benefit Life Insurance Company and in favor of the said Katherine Salentine for the sum of $3,724.42, damages, and $61.58, costs of suit; and whereas a certificate of division of opinion of the hon. the circuit judge and of the hon. the district judge, who tried said cause, has been obtained and filed; and whereas thereupon the said The Mutual Benefit Life Insurance Company, having obtained a writ of error and filed a copy thereof in
57 the clerk's office of said court to reverse the said judgment in the aforesaid suit, and a citation, directed to the said Katharine Salentine, citing and admonishing her to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October:

Therefore, if the said The Mutual Benefit Life Insurance Company shall prosecute said writ of error to effect and answer all damages and costs if it fail to make its plea good, then this obligation to be void; else to remain in full force and virtue.

AMZI DODD, [SEAL.]
President Mutual Benefit Life Insurance Company.
AMZI DODD. [SEAL.]
F. H. TEESE. [SEAL.]

Sealed and delivered in presence of—
F. K. HOWELL.

STATE OF NEW JERSEY, } ss:
Essex County, District of New Jersey, }

Amzi Dodd and Frederick H. Teese, being each first duly sworn, depose and say, and each for himself deposes and says, that he is one of the sureties mentioned in and who signed the within bond; that he is a resident and freeholder within the county & State aforesaid and is worth the sum of seven thousand six hundred dollars in property within the State of New Jersey over and above his debts and liabilities and property exempt from execution.

58 (Signed) AMZI DODD.
F. H. TEESE.

Subscribed and sworn to before me this 17th day of September, 1886.

F. K. HOWELL,
[SEAL.] *Notary Public, N. J.*

Endorsed: Approved. Chas. E. Dyer, judge.

Whereupon it is ordered that execution be suspended and a writ of error and citation issued and a copy of said writ of error lodged for the defendant in error.

59 UNITED STATES OF AMERICA, } ss:
Eastern District of Wisconsin, }

I, Edward Kurtz, clerk of the circuit of the United States of America for the eastern District of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate with their originals now on file and remaining of record in my office, and that they are true copies of such originals and correct transcripts therefrom, being a full and complete transcript of the record in the case of Katherine Salentine *vs.* The Mutual Benefit Life Ins. Co. of New Jersey.

In testimony whereof I have hereunto set my hand and duly affixed the seal of the said court, at the city of Milwaukee, in said district, this 30th day of September, in the year of our Lord one thousand eight hundred and eighty-six, and of the Independence of the United States the 111th.

Seal U. S. Circuit Court, Eastern District Wisconsin.

EDWARD KURTZ, *Clerk.*

60 UNITED STATES OF AMERICA, ss:

The President of the United States of America to the judges of the circuit court of the United States of America for the eastern district of Wisconsin, Greeting:

Because in the record and proceedings, as also in the rendition

Seal U. S. Circuit Court, Eastern District Wisconsin.

of a judgment in a plea which is in the said circuit court of the United States of America for the eastern district of Wisconsin, before you, between Katherine Salentine, plaintiff, and The Mutual Benefit Life Insurance Co. of New Jersey, defendant, a manifest error hath happened, to the great damage of the said The Mutual Benefit Life Insurance Co. of New Jersey, as by the complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error that of right and according to law and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 20th day of September, in the year of our Lord one thousand eight hundred and eighty-six, and of the Independence of the United States the 111th.

EDWARD KURTZ,
Clerk U. S. Circuit Court for the Eastern District of Wisconsin.

61 THE UNITED STATES OF AMERICA, *ss:*

To Katherine Salentine, Greeting:

[SEAL.] You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Wisconsin, wherein the Mutual Life Insurance Company of New Jersey is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice done to the parties in that behalf.

Witness the Honorable Charles E. Dyer, district judge of the United States for the eastern district of Wisconsin, at the city of Milwaukee, this 20th day of September, A. D. 1886, and of the Independence of the United States the 111th.

CHAS. E. DYER, *Judge.*

We accept service of this citation this 29th day of September, A. D. 1886.

E. P. SMITH &
NATH. PERELES & SONS,
Plaintiff's Attorneys.

Endorsed on cover: E. Wisconsin C. C. U. S. No. 391. The Mutual Benefit Life Insurance Company of New Jersey, plaintiff in error, *vs.* Katherine Salentine. Filed October 4, 1886.

Office Supreme Court U. S.
FILED.
NOV 1 1889
JAMES. H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 117.

THE MUTUAL BENEFIT LIFE INSURANCE COMPANY,
PLAINTIFF IN ERROR,

vs.

KATHERINE SALENTINE.

BRIEF FOR PLAINTIFF IN ERROR

F. C. WINKLER,
Of Counsel.

ED. KEOGH, PRINTER, BROADWAY, MILWAUKEE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 117.

THE MUTUAL BENEFIT LIFE INSURANCE COMPANY OF NEW JERSEY, PLAINTIFF IN ERROR,

vs.

KATHERINE SALENTINE.

The originals of the present action were two actions brought in the State Court of Wisconsin, upon two separate policies of life insurance, issued in favor of the plaintiff. The actions were there consolidated and thereupon removed to the Federal Court. Hence, we have two separate complaints and answers. The first complaint is on policy No. 105,844, dated September 19, 1881, for $2.000,00; the second on policy No. 115,218, dated September 20, 1883, for $3,000.00. Peter Salentine, the insured (husband of plaintiff), died January 6, 1884. Each complaint claimed the full amount of the policy, with interest, alleging that the death "was not caused by or from the intemperate use of stimulants or narcotics, nor by his, the said Peter Salentine's own hand, * * nor any cause mentioned in said policy, making the same void and of no effect;" also "that the death of said Peter Salentine was for causes within the true intent and meaning of said policy of insurance, and that said Peter Salentine, and this plaintiff, each duly fulfilled all the conditions of said policy." Record, p. 3 and p. 10.

The answer to each complaint alleges that the insured wilfully and knowingly took his own life; that the defendant has no knowledge of insanity on his part, but that if he was insane, plaintiff is entitled only to the amount of the premiums paid and interest, and that the defendant is ready and willing to pay this, and offered to do so before suit commenced. Record, p. 2 and p. 11.

The two policies vary in their provisions relating to suicide.

The first is accepted by the assured upon the express condition that "in case he shall die by his own hand, or etc. * * this policy shall be void, null, and of no effect, except that in case he shall die by his own hand while insane, the amount to be paid by the company on this policy shall be the amount of the premiums actually paid thereon, with interest. Record, p. 27.

The second, No. 115,218, is issued and accepted upon the following condition: "*That if the death of the insured shall result from the intemperate use of stimulants or narcotics, or if he shall die by his own*

hand or in consequence of a violation of any law, or by the hands of justice, this policy shall be void. If, however, it shall be shown that the assured at the time of taking his life was insane, the company will pay the sum insured or refund the premiums actually received, with interest thereon, according to its judgment of the equities of the case. This option is distinctly reserved by the company, and is made a part of this contract." Record, p. 29.

The action was first tried before the Hon. Charles E. Dyer, District Judge, and a jury, who, under direction of the Court, returned a verdict for the amount of premiums paid and interest. Record, p. 18.

The verdict was set aside by the Circuit Judge. Record, p. 20.

A new trial was had before the Hon. Walter Q. Gresham, Circuit Judge, and Hon. Chas. E. Dyer, District Judge, without a jury. Record, p. 20.

The Court found all the facts, annexing documentary evidence in the form of exhibits to its finding. Record, pp. 22–35.

It was held, both judges concurring, that on the first policy the plaintiff was entitled to recover the premiums paid and interest only, amounting to $310.92. As to the second policy, there was a difference of opinion, the District Judge considering that the right of recovery was confined to the premium paid and interest. Only one semi-annual premium, $53.47, had ever been paid, which with interest amounted to $68.36. The Circuit Judge held that she was entitled to the face of the policy, with interest, amounting to $3,413.50. The question was therefore certified to this Court, under Sec. 652, R. S. Record, p. 25.

Judgment was entered in accordance with the opinion of the Circuit Judge, which this writ of error is brought to review.

The only part of the policies material to the question is the condition above quoted from No. 115,218.

Aside from the issuing of the policies, the Court found: That on January 6, 1884, the insured took his own life.

That at the time he so died by his own hand he was insane and not morally responsible for the act.

That he knew the physical consequences of the act.

That on January 28, 1884, notice of the death was given and proof made "Exhibit C." (In the proof the plaintiff claims the full amount of both policies, "and that the said deceased did not violate any of the conditions of said policies." No cause of death is stated. Record p. 30.)

That as part of said proof, and in accordance with the requirements of the company, a copy of the coroner's inquest was forwarded, which showed a verdict that the insured "came to his death by hanging himself * * while laboring under a fit of insanity."

That on March 14, 1884, the letter of the company to its Milwaukee Agent (Exhibit I) stated that at a meeting of the directors the loss had been considered and it was decided that the case came under the insane clause of the policies, and that the premiums, with

interest, should be paid to the claimant. Record, p. 34. That notice of this letter was not given to the plaintiff.

That on April 26, 1884, the local agent wrote to the company (Exhibit 1½) that the parties in charge of this claim wished to know what the company proposed to do, and he could give them no answer; what answer he should give; that other companies had paid in full.

That on April 29th, 1884, the company wrote to its local agent (Exhibit 2) referring to letter of March 14th, and adhering to the decision there communicated.

That on April 28, 1884, the agent of the plaintiff wrote to the company (Exhibit 3), asking why payment had not been made; that other companies had paid over a month ago.

That on May 1, 1884, the company wrote to its local agent, enclosing accounts and receipts to be signed; also a letter to *plaintiff's* agent advising him that the action of the directors had been communicated to its agent, who should have advised the claimant of it before. That on May 5, 1884, this letter was delivered to plaintiff's agent, and he then informed of the decision of defendant as stated in the letter of March 14th. That plaintiff's agent peremptorily refused to accept re-payment of the premiums and interest, but demanded of the local agent payment of the amounts insured in full.

Record, pp. 22, 23, 24.

The above gives all the facts in the case.

Error: The judgment dismissed and entered.

ARGUMENT.

I.

It is, of course, competent for any person insuring his life, to enter into any stipulations in reference to death by suicide committed while insane, which the parties may agree upon.

Bigelow vs. Berkshire Life Ins. Co., 93 U. S., 284.
Pierce vs. Travelers' Life Ins. Co., 34 Wis., 389.

It is clear also that policy No. 115,128 makes the explicit provision that if the insured take his own life, and *it be shown* that at the time of taking it he was insane, the company was to do one of two things, either pay the sum insured or repay the premiums received with interest, according to *its* judgment of the equities of the case.

The beneficiary, therefore, in case of a death of this character, has a right only to either one of these things, which is left to the will of the company.

In such a case we submit that damages for the breach are necessarily for the lesser sum. It is this only to which the party has a *right*. The other can only be paid by the free will of the company. It is its voluntary act if it pays it. No action can lie for that.

If a provision of a policy were that in case the insured took his own life while insane, the company would pay the sum insured only if, according to its judgment of the equities of the case it ought to do so, no action would lie. The only promise which supports an action here is the one to refund the amount of premiums and interest in any event.

It is an absolute promise only—or a conditional one where the condition has been fulfilled—on which an action can be predicated. Let us suppose that the plaintiff in this case had alleged the actual facts, as now claimed by her, that her husband did commit suicide, but was insane when he did so; and let us further assume that the company had put the alleged insanity in issue, and this issue had, upon the trial, been found for the plaintiff. Can there be a doubt that the recovery would have been confined to the amount which the company was bound to pay in any event, without the exercise of volition on its part?

Can it be questioned that there could be no recovery for the larger sum without proof that, according to the company's "judgment of the equities of the case" (the condition on which it depends), it was due?

Can it be claimed that the whole sum must be paid without any regard to "the equities of the case?"

II.

But the ground on which it is sought to hold the company liable for the $3,000 seems to be that the company did not, within sixty days after proof of the death of the insured, offer to refund or inform the plaintiff that it would refund the premiums paid.

The policy promised to pay "within sixty days after due notice and satisfactory proof of the death of the insured." Record, p. 28.

We submit:

First. That this could have no possible bearing on the extent of the liability of the company.

The substance of the promise of the policy in suit is that the company will, in the case of such a death as the trial here has shown, pay either a larger or a smaller sum in its own discretion.

Its non-payment of either within the sixty days is simply a breach of this alternative promise. The plaintiff's measure of damage is that sum which he had the right to insist upon.

Secondly. The non-payment of either sum within the sixty days can have no influence upon the question, *unless* it be looked upon as evidence of an election by the company to pay the larger sum, not to avail itself of the right to discharge the obligation to pay the lesser.

It is respectfully urged that the circumstance of non-payment or failure to notify the claimant within the sixty days is not entitled to this construction.

It would not, in any case, warrant the inference of a waiver by the company of its right to discharge the contract according to "the equities of the case."

But, if standing alone, it might afford room for such an inference; the circumstances of this case utterly repel it. It is made to appear affirmatively, that as early as March 14, 1884, the company acted and advised its agent at Milwaukee that it had been decided that "the premiums, with interest, should be paid the claimant." It is true that for some reason this decision was not immediately brought to the knowledge of the plaintiff, but the plaintiff sustained no injury from that circumstance. The plaintiff never took the position that by reason of failure to make offer, or to make known its decision within sixty days she was entitled to $3,000, but claimed that amount from the beginning, asserting both in the proofs of loss and again in her complaint that there had been no sort of violation of any condition of the policy. The delay in giving notice to the plaintiff involved no injury to her. On the 28th of April, 1884, the plaintiff's agent (a brother of the deceased) wrote to the company for information, and was then promptly advised of the decision made by the company on or before the 14th of March (Record, p. 24). This was before suit commenced, and the agent, "then and there on behalf of the plaintiff, refused to accept repayment of the premiums and interest, but demanded of the local agent, payment of the amounts insured in full." *Ibidem.* This demand related to both policies. It manifestly rests on the theory stated in the proof of loss, and reiterated in the suits thereupon brought, that there had been full compliance with the conditions of the policies; in other words, that there had been no suicidal death. It is clear, therefore, that while the adjustment of this loss was the subject of correspondence between the parties, the exercise of its option reserved to the defendant by its contract, was fully communicated to the plaintiff, who peremptorily repudiated the offer. It is idle, therefore, to say that there can be any inference of waiver of a substantial right on the part of the company here.

III.

If a doubt remains, there is another conclusive answer to the claim that the company did not act with sufficient promptness in offering repayment of the premium with interest.

The language of the policy is, "if, however, it *shall be shown* that the assured at the time of taking his life was insane, the company will, etc."

Before, therefore, the claimant can insist on action by the company in the exercise of the option, she must *show* to the company that the case for its exercise exists.

That showing has never been made in this case.

The only statement made by the plaintiff in this case is her affidavit of claim in the proofs of death. Record, p. 30, Ex. C.

The affidavit of claim relates to both policies. In it she says: "I, deponent, claim that the said deceased did not violate any of the conditions of said policies; that deponent has a good and valid interest in said policies to the amount of $5,000.00, and she is legally entitled to receive the same as the beneficiary named in said policies."

In view of the express conditions which the two policies respectively contain in reference to suicide, this affidavit can receive no other construction than that of an out and out denial that the deceased came to his death by suicide. True, a copy of the coroner's inquest was enclosed with the proofs; but that was merely done because the rule of the company required it. It was not sent as proof of the claimant's statement. It was not only not binding on the plaintiff, but not even admissible in evidence against her. She was at perfect liberty to claim (and to prove if she could) that notwithstanding the evidence and finding on this inquest, though forwarded by her, the deceased did not raise his hand against his own life.

While this inquest is no proof of the suicide of the deceased between these parties, it is of course equally ineffective to prove insanity on the part of the deceased.

No proof or *showing* had therefore been made, or attempted to be made, in this case up to the time of the commencement of the action of *either*, that the deceased had died by his own hand or that he was insane when he did so. On the contrary, the claim was that he had died such a death as *entitled* the claimant to the full amount of both policies.

This claim was reiterated by the complaints in the two actions brought.

No case was ever *shown* that called upon the defendant to make its decision upon the equities of suicide until the very trial of the case. Up to that time the plaintiff could bring forward proof of accidental death, or any death other than by suicide without the slightest inconsistency with any position ever taken, or any *proofs* ever produced by her.

Before it can be claimed that the company has lost a valuable right by failure of prompt action in the case of a suicide, it is certainly incumbent upon the claimant seeking advantage therefrom to show that he had fully presented the facts on which he claims the company should have acted.

These facts were never *shown* until the trial of the case, and it was then only that the company could be *required* to make its election.

It is true it had in its answers to the complaint, although without proof or knowledge of the insanity of the deceased, offered to refund the premiums paid with interest, but that was purely voluntary. The policy does not require it to be done until "it *shall be shown* that the assured at the time of taking his life was insane." There can be no laches in failure to act until this is *shown*. Certainly it is not shown while the opposing party controverts the suicide.

We beg, in conclusion, to refer to the opinion of the District Judge, the Hon. Charles E. Dyer, given when the case was first heard before him.

Salentine vs. Mut. Ben. Life Ins. Co., 24 Fed. Rep., 159.

Respectfully submitted,

F. C. WINKLER,

Counsel for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 117.

THE MUTUAL BENEFIT LIFE INSURANCE COMPANY OF NEW JERSEY, PLAINTIFF IN ERROR.

vs.

KATHERINE SALENTINE, DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

GEORGE P. MILLER,
Attorney for Defendant in Error.

CRAMER, ARENS & CRAMER, ENGRAVERS & PRINTERS, MILWAUKEE.

SUPREME COURT OF THE UNITED STATES.

THE MUTUAL BENEFIT LIFE INSURANCE COMPANY OF NEW JERSEY, PLAINTIFF IN ERROR,

vs

KATHERINE SALENTINE, DEFENDANT IN ERROR.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

STATEMENT.

On the 17th day of May, 1884, the defendant in error commenced in the County Court for the County of Milwaukee, in the State of Wisconsin, two separate actions against the above plaintiff in error.

The complaint in the first of said actions, after the usual averment of defendant's incorporation and license to do business, to sue and be sued within the State of Wisconsin, alleges:

2d. That on the 19th day of September, 1881, the defendant, in consideration of ninety-seven and forty-one one-hundredths dollars to them in hand paid by the plaintiff, the wife of Peter Salentine hereinafter named, residing in the City of Milwaukee, Wisconsin, and of the annual premium of ninety-seven and forty-one one-hundreths dollars to be paid on the 19th day of September in every year during the continuance of the policy hereinafter named, did, by their agents duly authorized thereunto, make and deliver to the plaintiff their certain policy of insurance of that date, and numbered 105,844, on the life of said Peter Salentine, the husband of said plaintiff, who had a valuable interest in the life of her said husband, in the amount of two thousand dollars for the term of life, and did therein and thereby promise and agree to and with the said Katherine Salentine well and truly to pay or cause to be paid the sum of two thousand dollars therein mentioned at their office, in the City of Newark, to the said Katherine Salentine *within ninety*

days after due notice and satisfactory proof of the death of said Peter Salentine; and it was therein further promised and agreed by the defendant that in case the said Katherine Salentine should die before the decease of said Peter Salentine then the amount of said insurance should be payable to their children born of said marriage, or to their guardian if under age, within ninety days after due notice and satisfactory proof of interest and of the death of said Peter Salentine, deducting therefrom all indebtedness of the party to the company, together with the balance, if any, of the year's premium.

3d. That thereafter on the 6th day of January, 1884, at the City of Milwaukee, Wisconsin, the said Peter Salentine died, said policy being in full force and operation, which death was not caused by or from intemperate use of stimulants or narcotics, nor by his, the said Peter Salentine's, own hand, nor in consequence of the violation of any law, nor by the hands of justice, nor from any cause mentioned in said policy, as making the same void and of no effect.

4th. That the death of the said Peter Salentine was from causes within the true intent and meaning of said policy of insurance, and that the said Peter Salentine, and this plaintiff, each duly fulfilled all the conditions of the said policy of insurance, on his or her part therein contained.

5th. That due notice and satisfactory proof of the death of said Peter Salentine was, by this plaintiff, duly made, given and furnished to the said defendant on the 22d day of January, 1884, as required by the terms of said policy and the rule of the defendant, within one year after his decease.

6th. That although demanded, no part of said insurance has been paid, and said sum, with interest from ninety days after the date of said proof, is now due thereon from the said defendant, to this plaintiff, and the plaintiff demanded judgment against the defendant for the sum of two thousand dollars, and interest as aforesaid, with costs and disbursements in the action.

The answer admitted the issuance of the policy as in the complaint alleged and averred, that such policy expressly provided in the body thereof, that in case said Peter Salentine should die by his own hand, said policy should be void, null, and of no effect, except that in case he should die by his own hand while insane, the amount to be paid to the defendant on said policy should be the amount of the premiums actually paid thereon, with interest.

Further answering, the defendant admitted that said Peter Salentine died at the time in said complaint alleged, but averred that he died by his own hand; that he purposely, willfully and knowingly took his own life; that the defendant is informed and believes that it is claimed on the part of said plaintiff that said Peter Salentine at the time he so took his life was insane, and further avers, "whether or not said defendant, plaintiff, then was insane this defendant has no knowledge or information sufficient to form a belief, but insists that if so, said plaintiff is entitled to recover only the premiums actually paid on account of said policy, with interest."

And avers that it has been ready and has offered, prior to the commencement of this action, to repay such premiums and interest to the plaintiff.

Further answering, the defendant *admitted the receipt of a notice and proof of death of said Peter Salentine on the 17th day of January, 1884.*

Further answering, the defendant denied each and every allegation in said complaint contained not thereinbefore admitted.

The complaint in the other of said actions, after the entitling, was substantially similar to that in the first action, except that it averred that on the 20th day of September, A. D. 1883, the defendant, in consideration of the sum of eighty-three and fifty-two one hundredths dollars to them in hand paid by the said plaintiff, wife of Peter Salentine, hereinafter named, residing as aforesaid, and of the semi-annual premium of eighty-three and fifty-two one hundredths dollars to be paid on the 20th day of September and the 20th day of March in every year during the continuance of this policy hereinafter named, did, by their agents, duly authorized thereunto, make and deliver to the plaintiff their certain policy of insurance of that date, numbered 115,218, on the life of Peter Salentine * * * * and *did therein and thereby promise and agree to, and with the said Katherine Salentine, well and truly to pay, or cause to be paid, the said sum of three thousand dollars* at their office in the City of Newark, to the said plaintiff *within sixty days after due notice and satisfactory proof of the death of the said Peter Salentine.* And it was therein further promised and agreed by the defendant that in case said assured should die before decease of said insured, then the amount of said insurance should be payable to their children, etc., * * * * *within sixty days after due notice and satisfactory proof of interest and of death of said insured,* deducting therefrom all indebtness of the party to the company, together with the balance, if any, of the then current year's premiums.

Second. Thereafter, and on the 6th day of January, 1884, at the City of Milwaukee, said Peter Salentine died, said policy then being in full force and operation.

The remainder of said complaint was similar to that in the first of said actions with the exception of the prayer for judgment, it being for three thousand dollars and interest from the date of the notice and proof of death, and costs and disbursements (Transcript, page 9).

The defendant *answering* said complaint admitted the issuance to the plaintiff of the policy of insurance as in the complaint alleged and averred; that *in said policy so issued it was expressly provided and stipulated that "if said Peter Salentine, the insured, should die by his own hand, said policy should be void. If, however, it should be shown that the insured, at the time of taking his life was insane, the company would pay the sum insured, or refund the premiums actually received, with interest thereon, according to its judgment of the equities of the case, and it was*

expressly stipulated in said policy that such option was distinctly reserved by the company and made a part of the contract."

Further answering the defendant averred that Peter Salentine died at the time mentioned in the complaint, but alleges that he died by his own hand; that he purposely, willfully and knowingly took his own life.

The defendant further averred upon information and belief, that the plaintiff claims that at the time said Peter Salentine so took his life he was insane. Whether or not he was insane, the defendant has no knowledge or information sufficient to form a belief. But defendant avers that the plaintiff, prior to the commencement of this action, through her agent and attorney, made the claim that the said Peter Salentine was insane when he took his life and that this defendant *thereupon* in accordance with the terms of said policy *elected, according to its judgment of the equities of the case, to repay to the plaintiff the sum insured with interest and notified said plaintiff thereof*, but that the plaintiff refused to accept the same and this company does now elect, and is ready and willing to repay to the plaintiff the premiums actually received with interest thereon.

The defendant further answering admits that it received on or about the 28th day of January, 1884, notice and proof of the death of said Peter Salentine, and further answering the defendant denies each and every allegation in the complaint contained, not hereinbefore admitted. (Transcript, page 11.)

Thereafter on application of the defendant in said actions the said County Court ordered that the same be and the same were consolidated. And thereafter, on application of the said defendant the said actions so consolidated were removed to the Circuit Court of the United States for the Eastern District of Wisconsin.

The issues came on for trial in said Court on the 30th day of March, A. D. 1885, Hon. Charles E. Dyer, District Judge, presiding, and were continued from day to day until the 31st day of March, 1885, when the jury brought in a special verdict in answer to questions propounded by the Court. See Transcript, pages 17, 18.

Thereafter during said term the plaintiff, by her counsel moved to set aside the verdict and for a new trial for the reasons that said verdict was contrary to the law and the evidence in the case, and that the Court erred in overruling plaintiff's objections to testimony offered and received on the part of the defendant and excepted to by the plaintiff on the trial; and thereafter, on the 17th day of July, A. D. 1886, present the Hon. Walter Q. Gresham, Circuit Judge, and the Hon. Chas. E. Dyer, District Judge, said motion having been argued, it was ordered by the Court: That a new trial be and the same was granted in said action. Thereafter, on the 15th day of July, A. D. 1886, at a term of said Circuit Court, the issues in said action came on to be tried, when the parties entered into and duly filed an agreement in writing, waiving a jury, and that the issues of fact therein be tried and determined by the Court upon the evidence without the intervention of the jury, and without further notice (Transcript, page

20). The said issues were thereupon tried by the Court and submitted by counsel upon the pleadings and the evidence and on consideration thereof the Court found, that the plaintiff was entitled to recover, under policy No. 105,844, of the defendant the sum of three hundred and ten and ninety-two one-hundredths dollars, being the amount of premiums actually paid thereon, with interest to said date; and further, pursuant to the opinion of the Circuit Judge, that the plaintiff was also entitled to recover of the defendant, in addition to the amount above stated, the further sum of three thousand four hundred and thirteen and fifty one hundredths dollars, being the amount insured by policy No. 115,218, with interest to said date, and judgment was accordingly duly entered in pursuance of said finding in favor of said plaintiff and against the said defendant for the sum of three thousand nine hundred and twenty-four and forty-two one-hundreths dollars, together with sixty-one and fifty-eight one-hundredths dollars, costs in the said action, judgment roll being signed July 15, 1886. (Transcript, page 21.) The said judges being divided in opinion thereon, a certificate of such division was and is filed as follows:

"At a stated term of the United States Circuit Court for the Eastern District of Wisconsin, begun and held at the court-room in the City of Oshkosh, within said district, on the first Monday in July, A. D. 1885, to-wit: On the 15th day of July, A. D. 1885, during said term.

Present: Hon. Walter Q. Gresham, Circuit Judge; Hon. Charles E. Dyer, District Judge.

KATHERINE SALENTINE, Plaintiff,
vs.
THE MUTUAL BENEFIT LIFE INS. CO., OF NEW JERSEY, Defendant.

This case having been brought on for hearing and trial before the Court without a jury, a trial by jury having been waived by the written stipulation of the attorneys in the suit herein of the above parties, and said stipulation having been duly filed with the clerk of this court as by statute made and provided, and the proofs and allegations of the respective parties and the arguments herein having been heard, the court now here decides and finds as facts established by said evidence as follows:

First. That said defendant, the Mutual Benefit Life Insurance Company of New Jersey, on the 19th day of September, 1881, through its local agent at Milwaukee, Wisconsin, issued policy of insurance No. 105,844, to the plaintiff, the wife of Peter Salentine for two thousand dollars ($2,000), on the life of said Peter Salentine, of Milwaukee aforesaid, described in the complaint and answer in this action, a copy of which policy is hereto annexed and marked "Exhibit A."

Second. That said defendant, on the 20th day of December, 1883, issued, through its local agent aforesaid at Milwaukee, policy of insurance No. 115,218, to the said plaintiff, wife of Peter Salen-

tine, for three thousand dollars ($3,000), on the life of the said Peter Salentine, described in the complaint and answer in this action, a copy of which policy is hereto annexed and marked "Exhibit B"; that in and by said policy the said defendant agreed and promised the assured well and truly to pay or cause to be paid the said sum insured at their office, in the city of Newark, to the said assured within sixty days after due notice and satisfactory proof of the death of said insured. Said policy was issued and accepted by the assured upon the following condition, among others therein stated, to-wit:

"That if the death of the insured shall result from the intemperate use of stimulants or narcotics, or if he shall die by his own hand or in consequence of a violation of any law, or by the hands of justice, this policy shall be void. If, however, it shall be shown that the insured at the time of taking his life was insane, the company will pay the sum insured or refund the premiums actually received, with interest thereon, according to its judgments of the equities of the case. This option is distinctly reserved by the company and is made a part of this contract."

Third. That said policies being in full force, the said Peter Salentine, on the 6th day of January, 1884, at Milwaukee, aforesaid, took his own life.

Fourth. That he so took his own life while insane.

Fifth. That the said Peter Salentine at the time he so died by his own hand, was insane and was not morally responsible for the act.

Sixth. That at that time he knew the physical consequences of the act.

Seventh. That notice and proof of his death as aforesaid was duly given and furnished to said company on each of said policies on the 28th day of January, 1884, and within the time required by said policies, a copy of which notice and proof is hereto annexed and marked "Exhibit C."

Eight. That, as a part of said proof and in accordance with the requirements of said company the said assured at the same time furnished and delivered to said company a duly certified copy of the coroner's inquest, taken at Milwaukee on the 7th day of January, 1884, before the coroner in and for said county, upon the body of said Peter Salentine, together with the evidence given before said coroner and jury; which inquest, after reciting such evidence was as follows:

"STATE OF WISCONSIN, } ss
"MILWAUKEE COUNTY }

"An inquisition taken at Milwaukee, in the county of Milwaukee, on the 7th day of January, 1884, before me, Charles Kuepper, coroner in and for said county, upon the view of the body of Peter Salentine, about fifty-five years old, there dead, by the jurors, whose names are hereunto subscribed, who, being duly sworn to inquire, on

behalf of the people of this State, when, in what manner, and by what means the said Peter Salentine came to his death, upon their oath do say that the said Peter Salentine, on the 6th day of January, 1884, came to his death by hanging himself in a tin shop in the yard of his house, 315 Third Avenue, Eighth Ward, while laboring under a fit of insanity.

"In testimony whereof said coroner and jury of this inquest have hereunto set their hands and seals the day and year aforesaid."

Which inquisition was signed by the said jurors as well as by the said coroner, as by statute provided, and the seal of said coroner attached thereto on the 7th day of January, 1884.

Ninth. That the defendant, on the 14th day of March, 1884, notified its said local agent at Milwaukee, by letter, that it had decided that the case of the loss under said policies came under the insane clause, and that the premiums, with interest, should be paid to the claimant. A copy of said letter is hereto annexed and marked "Exhibit 1."

Tenth. That no notice of the contents of said letter was given to the said plaintiff, the assured named in said policies.

Eleventh. That afterwards, on April 26th, 1884, the said local agent wrote and sent to the defendant a letter of that date, of which a copy is hereto annexed and marked "Exhibit 1½", stating that the parties having charge of the Salentine claim here wished to know what the company proposed to do in the case, and that he could give them no answer and asking what answer, if any, he should give them; that on the 29th day of April, 1884, the said defendant wrote to its local agent that on the 14th of March the defendant had communicated to him the action of the directors in regard to said policies, and that there could be no change in the terms of settlement proposed. A copy of said letter is hereto annexed and marked "Exhibit 2." That on the 28th day of April, 1884, Christian Salentine, the agent of the plaintiff, wrote and sent to the defendant a letter of that date asking for information why payment had not been made on the said policies, a copy of which letter is hereto annexed and marked "Exhibit 3;" that the defendant thereupon and thereafter sent to its said local agent at Milwaukee a letter dated May 1st, 1884, a copy of which is hereto annexed and marked "Exhibit 4," enclosing statement of account and temporary receipt, in case of loss under said policies to be used in case of settlement, and enclosing a letter of the same date from the defendant, addressed to Christian Salentine, with orders to forward the same to him, which letter, after the date and address, was in the language following:

"Your favor of the 28th ult. is received. We have communicated to our agent, Mr. Nichols, the action of our directors on the two policies on life of Mr. Peter Salentine, and the information should have been given to claimants before now. The policies are

entirely different from those paid by the other companies, and we pay them according to the express terms under which they were issued.

"Yours truly,

"EDWIN L. DOBBINS,

"*Secretary.*"

Twelfth. That on the 5th day of May, 1884, said letter so addressed to Christian Salentine, was delivered to him, and he notified, for the first time, of the said decision of the defendant as contained in their said letter of March 14th, 1884; that he then and there, on behalf of the plaintiff, refused to accept repayment of the premiums and the interest, but demanded of the local agent payment of the amounts insured in full.

Thirteenth. That said defendants have made no payment of any amount stated in said policies or tender of payment to the said plaintiff.

Fourteenth. That the amount of premiums paid by said deceased on said policy No. 105,844 was as follows:

September 19, 1881	$97.00
" 1882	76.42
September 19, 1883	78.16

That the amount of interest at six per centum on the same from the respective dates of each payment to the 15th day of July, 1886, is $58.94, making a total of $310.92 now due the plaintiff on said policy from the said defendant.

Fifteenth. That the amount of premiums paid by said deceased upon policy No. 115,218, were as follows:

September 20, 1883	$58.47

That the amount of interest at six per centum on the same from the date of said payment to the 15th day of July, 1886, is $9.89, being a total of sixty-eight dollars and thirty-six cents.

Sixteenth. That the interest upon the sum insured by policy No. 115,218, from March 30, 1884, to the 15th day of July, 1886, at the rate of six per centum, amounts to $413.50, making the whole amount so insured, with interest to said date, three thousand four hundred and thirteen dollars and fifty cents.

Seventeenth. That none of the sums hereinbefore stated or any part thereof have been paid by the said defendant.

Upon the foregoing facts, the following are the conclusions of law:

First The plaintiff is entitled to recover, under Policy No. 105,-844, of the defendant, the sum of three hundred and ten dollars and ninety-two cents ($310.92), being the amount of the premiums actually paid thereon, with interest to this date, as found by the fourteenth finding of fact herein.

In this conclusion the said Circuit and District Judges concur.

Second. The plaintiff is also entitled to recover of the defendant, in addition to the amount above stated, the further sum of three thousand four hundred and thirteen dollars and fifty cents

($3,413.50), being the amount insured by Policy No. 115,218, with interest to this date, as found by the sixteenth finding of fact herein.

The second conclusion of law is established on the facts so found in the opinion of the said Circuit Judge, who is opposed in said conclusion and opinion by the said District Judge, said Circuit Judge being of opinion that on the facts found the plaintiff is entitled to recover on Policy No. 115,218, the amount insured, three thousand dollars, with interest, and the District Judge being of opinion that the plaintiff is entitled to recover on said policy only the amount of premium paid thereon, with interest to this date, amounting to $68.36.

It is therefore, by request of both parties hereto, ordered that the said question, as to said second conclusion of law, be certified to the Supreme Court of the United States—that is to say, was and is the plaintiff entitled to recover the said sum of three thousand dollars so insured by said policy No. 115,218, with interest as aforesaid, or only entitled to recover on said policy said premium, with interest as aforesaid?

(Signed) WALTER Q. GRESHAM
Circuit Judge.

(Signed) CHAS. E. DYER,
Dist. Judge.

ARGUMENT.

First. The sole question submitted for decision is as to the liability of the defendant Company for the full payment of the sum insured by policy numbered 115,218. That policy contains but three provisions necessary for consideration, to-wit:

(1.) This policy witnesseth, that the Mutual Benefit Life Insurance Company, in consideration, etc. * * * * do insure the life of Peter Salentine in the amount of three thousand dollars. * * * *And said Company does hereby promise and agree to and with said insured well and truly to pay, or cause to be paid, the said sum insured at their office in the City of Milwaukee to the said assured within sixty days after due notice, and satisfactory proof of the death of the said insured.*

(2.) This policy is issued and is accepted by the assured upon the following conditions, viz.: * * * * That if the death of said insured shall result from the intemperate use of stimulants or narcotics, or if he shall die by his own hand * * * * this policy shall be void.

(3.) *If, however, it shall be shown that the insured at the time of taking his life was insane, the Company will pay the sum insured or refund the premiums actually received, with interest thereon, according to its judgment of the equities of the case. This option is distinctly reserved by the Company and is made a part of this contract.* (*Transcript, pages 28–29.*)

Assuming the third clause to be valid, we are at once met with two questions:

First. It being in the alternative, what were the duties of the parties interested after the suicide of the insured when insane?

Second. What was the result or effect of neglect to properly exercise its option on the part of the insurer within the limited period of sixty days provided in the policy?

I.

As to the first of these questions it is clear from the policy and the ordinary rules of law, that the company must be furnished with due notice and satisfactory proof of the death of the insured and of the manner of his death.

In this case such notice and proof were furnished on the 28th day of January, 1884. Transcript, page 23. This proof included the manner of his death, to-wit, suicide from insanity, the latter fact being established by a certified copy of the coroner's inquest accompanying the proof in accordance with the directions of the company. Transcript, pages 23–34. This was the whole duty of the plaintiff in the premises. This showing was made to the company like any other proof of loss under a policy valid for the whole amount. As was said in Badger *vs.* Phoenix Insurance Company, 49 Wis., 399, "The only object of requiring proofs of loss by the assured is to give the company evidence *showing* that the loss was not fraudulent and showing the extent of the loss, *so it may judge of the justice* of the claim made by the assured under their policy."

It appears that the company took no steps to further investigate the matter, but were satisfied with the proof so received on the 28th day of January, 1884. See letter to Nichols, transcript page 34. So that on that date the plaintiff had "shown that the insured at the time of taking his life was insane." Thus plaintiff fully performed his duty under this policy by fully notifying the company of the death, and that the insured, at the time of taking his life was insane.

II

Thereupon arose the duty of the company either to pay the full amount insured at the expiration of sixty days, or within that time to exercise its option and refund the premiums actually received, if it so elected.

It appears by the answer of the defendant in this case that the company admits the receipt of the proof on the 28th day of January, 1884, when they allege, "The plaintiff, prior to the commencement of this action through his agent and attorney, made a claim that said Peter Salentine was insane when he lost his life; that this defendant *thereupon in accordance with the terms of said policy elected, according to its judgment and the equity of the case, to refund the premiums actually received with interest thereon.*" Indeed it further appears in

the answer that the company "does now elect and is ready and willing to repay to plaintiff the premiums actually received, with interest thereon." This is an admission of the satisfactory nature of the proofs admitted to be received on the 28th day of January, 1884, and of the duty of the company to have acted upon such proofs at that time, and an assertion that no further proof need be offered. The real form and effect of the contract of insurance is that the defendant promises, in consideration of the premiums paid that it will "well and truly pay, or cause to be paid the said sum insured within sixty days after due notice and satisfactory proof of the death of the insured, but if the proof shows that the insured took his own life while insane, the company may elect not to pay the three thousand dollars insured, but to refund the premiums, with interest if, in its judgment, that would be equitable." It will be thus seen that the policy is not invalidated by suicide when insane, but remains good for the full amount of three thousand dollars, unless the company elects to refund the premiums with interest, if in its judgment that would be equitable.

It is quite clear that when, as here, the proof of insanity and suicide are undisputed and the time of payment under the policy is expressly limited to sixty days from the date and reception of such proof, there being no express limination in the option clause as to the time of exercising their election, that the right to exercise that election is to be referred back to the time before expressed in the contract for payment, to-wit, sixty days prior to the time of promise of payment; which necessarily implies that if on receipt of proof of death as in other cases of death from natural causes, the company not making any objection and not returning the proofs and not having notified the plaintiff of any election, is presumed to have conceded its liability for the full amount insured. It will be noticed that by the policy of insurance the company agrees to pay the full amount insured, unless it makes the election, so that the time of payment, whether of the larger or the smaller sum, is fixed at the expiration of sixty days from the receipt of satisfactory proof of death, and the plaintiff can at the expiration of the sixty days, within which, it was agreed that the amount should be paid, bring his suit for the recovery of the full amount insured, unless previous to the expiration of such sixty days the insurance company has exercised its election to refund the premiums paid, together with interest, in which case the plaintiff can only recover such smaller amount.

In the case at bar it appears by the uncontradicted evidence that the insurance company did not elect to pay such smaller amount within such sixty days, so that, at the expiration of said limitation, their obligation to pay the full amount insured became absolute and not subject to any right of election. *By the policy itself the company did not agree that it would make any election, but absolutely agreed to pay the full amount insured at the expiration of sixty days, unless within that time it made an election to pay a smaller amount.* Therefore, when it did not make the election within such sixty days to pay the smaller

amount, its obligation to pay the full amount insured became absolute, and the plaintiff was then entitled to bring suit for the recovery of the full amount insured. We will briefly refer to the testimony, so as to show that by the undisputed evidence the insurance company made no election within the sixty days after the receipt of proofs of loss on January 28th, 1884.

The ninth finding of fact states that the defendant, on the 14th day of March, 1884, notified its local agent at Milwaukee, by letter, that it had decided that the case of loss under said policies came under the "insane clause," and that the premiums, with interest, should be paid to the claimant, a copy of which letter is as follows:

"NEWARK, N. J., March 14th, 1884.

"*Mr. Henry Nichols, Milwaukee, Wis.:*

"At the meeting of the directors yesterday, the case of loss "under policies Nos. 105,844 and 115,218, Salentine, was "fully considered, and it was decided that the case came "under the insane clause of the policies, and that the pre- "miums, with interest, should be paid to the claimant. * "* * * "Yours truly,

"EDWARD L. DOBBINS,

"*Secretary.*"

The tenth finding of fact: "That no notice of the contents of said letter was given to said plaintiff, the assured named in said policy."

The eleventh finding of fact: That afterwards, on April 26th, 1884, the said local agent wrote and sent to the defendant a letter of that date, as follows:

"MILWAUKEE, 4, 26, 1884.

"*Mutual Benefit Co.:*

"GENTS: The parties having charge of the Salentine "claim here wish to know what the Company propose to do "in the case, and *I can give them no answer.* What answer, if "any, shall I give them? The other companies interested "have paid their claims in full, they inform me.

"Yours truly,

"H. NICHOLS."

That on the 29th day of April, 1884, the said defendant wrote to its local agent as follows:

"NEWARK, N. J., April 29, 1884.

"*Mr. Henry Nichols, Milwaukee, Wis.:*

"DEAR SIR: Your favor of the 26th inst. is received. "On the 14th of March we communicated to you the action "of our directors in regard to policies No. 105,844 and No. "115,218, on the life of Peter Salentine. There can be no "change in the terms of settlement proposed, which are in "exact accordance with the terms of the policies. The fact

"that other policies have been paid by companies under dif-
"ferent contracts cannot affect the action of this company.

"Yours truly,

"EDWARD L. DOBBINS."

That on the 28th of April, 1884, Christian Salentine, the agent of the plaintiff, wrote and sent to the defendant a letter of that date asking for information why payment had not been made on the said policies * * * That the defendant thereupon and thereafter sent to its said local agent at Milwaukee, a letter dated May 1st, 1884, as follows:

"NEWARK, N. J., May 1, 1884.

"*Mr. Henry Nichols, Milwaukee, Wis.:*

"We enclose statement of account and temporary receipt in
"case of loss under polices No. 105,844 and 115,218, Salen-
"tine. The policies and this account should be returned to
"us duly receipted, with the 1883 renewal of No. 105,844.
"We also enclose letter addressed to Christian Salentine,
"which please forward. Yours truly,

"EDWARD L. DOBBINS,

"*Secretary,*"

The letter addressed to Christian Salentine, is as follows: (Transcript, page 24.)

"Your favor of the 28th ult. is received. We have com-
"municated to our agent, Mr. Nichols, the action of our
"directors on the two policies on life of Mr. Peter Salentine,
"and the information should have been given to claimants
"before now. The policies are entirely different from those
"paid by the other companies, and we pay them according to
"the express terms upon which they were issued.

"Yours truly,

"EDWARD L. DOBBINS,

"*Secretary.*"

The twelfth finding of fact, is as follows:

"That on the 5th day of May, 1884, said letter so addressed
"to Christian Salentine, was delivered to him, and he notified
"for the first time of the said decison of the defendant. * *
"* * That he then and there, on behalf of the plaintiff refused
"to accept repayment of the premiums, and interest, but
"demanded of the local agent payment of the amount in
"full."

From this uncontradicted evidence, it appears, that the plaintiff was first notified that the Insurance Company claimed to have elected to refund the amount of premiums, with interest, on May 5, 1884, by letter of that date, which was after the expiration of sixty days from the date and receipt of the satisfactory proof of death. The correspondence referred to above was entirely between the insurance company and one of its agents, and it was not to the plaintiff, nor was it brought to the knowledge of plaintiff, but neither

the plaintiff nor his agent received any notice whatever until the 5th day of May, 1884, nor did that notice refer to the previous correspondence between the company and its agent, nor did it state when the company had determined to return the premiums and not to pay the loss; nor was it accompanied with any payment or tender of the premiums. It is not even an agreement to refund the amount of the premiums; nor does it state what the amount of premiums, with interest, will amount to, nor, make any reference thereto.

Under no circumstances was any notice given to the plaintiff, or her attorney, or that which pretended to be a notice, until May 5th, 1884. The defendant, therefore, cannot be said, in any event, to have made any election prior to that date. If it had determined to make an election before that date it was not a perfected or concluded election until notice thereof was given to the other party interested.

III.

Under our construction the payment was to be made on or before the expiration of sixty days from the 28th day of January, 1884, and if the defendant desired to refund the premiums, and avoid the payment of the amount insured, they should as above stated have given notice of such decision on or before the expiration of that day. There is no hardship in this requirement. The determination to exercise its option was within the knowledge of the company and not that of the plaintiff.

In Tasker *vs.* Bartlett, 5 Cush., 364, Mr. Justice Wilde, says, "that it is a well-known principle that where one party has knowledge of a material fact not known to the other party, he is bound to give notice."

See also Quarles *vs.* George, 25 Pick., 400.
1st Parsons on Contracts, 6th Ed., 539, Note d.
Benjamin on Sales, Sec. 577, p. 562.

"When," says Mr. Wharton, "the promisor has his choice he need not notice his election until the time when the promise is to be performed."

2d Wharton on Contracts, Sec. 619.

Here, as we have seen by the express terms of the contract, the election was to be made "when it shall be shown that the insured, at the time of taking his life, was insane."

"If," says Mr. Benjamin, "an obligee has reserved any option to himself by which he can control the event on which the duty of the obligor depends, then he must give notice of his act before he can call upon the obligor to comply with the agreement."

Benjamin on Sales, Sec. 577, p. 552.

"And," he continues, "there are cases in which from the very

nature of the transaction the party bound on the condition of this sort, is entitled to notice from the other of the happening of the event on which liability depends."

In support of this provision he cites, Vyse *vs.* Wakefield, 6 M. & W., 442, in which case a declaration on demurrer was held *bad* because it did not aver notice by the plaintiff to defendant of the issuing of the policy of insurance on the defendant's life, the plaintiff having reserved to himself the liberty of effecting his insurance at any office within the bills of mortality, and having also reserved to himself the choice of time of effecting the insurance."

"It appears to me," says Lord Abinger, 451, "that he ought to give the defendant notice of his having exercised the option, and of the insurance having been effected before the action can be maintained." See also note to this case, 456.

Smith *vs.* Sanborn, 11 Johns., 59.

In Choice *vs.* Mosley, 1st Bailey, 136, it was held that if one contract in the alternative to do one of two things by a certain day, he has until that day is past the right to elect which of those he will perform, and if he suffer the day to elapse without performing either, his contract is broken and his right of action lost."

See also Suffle *vs.* Iowa Ins. Co., 58 Iowa, 29.

The same principle has been applied where the promise has been in the alternative, either to pay the specified sum, or in lieu thereof, to deliver certain chattels at a particular time, the right of election belongs to the promisor and he may pay the money or deliver the chattels at his option, provided he make election of the payment or delivery before the day for performance has passed."

Stewart *vs.*. Donnelly, 4 Yerg, (Tenn.), 177.

Gilman *vs.* Moore, 14 Vermont, 457.

Plowman *vs.* Riddell, 7 Ala., 773.

"But if the day is permitted to pass, without any election by the promisor, the right of election has gone, and the promisee has the absolute right to the money and may maintain an action for its recovery."

Trowbridge *vs.* Halcomb, 4 O. St., 33.

Heyward *vs.* Heyward, 42 Me., 229.

Mills *vs.* McClan, 10 Yerg. (Tenn.), 245.

IV.

If, however, there was no such express limitation of sixty days, still it was the duty of the company, within a reasonable time, after receiving the proofs on the 28th of January, 1884, to have elected, if they would simply return the premiums, and so electing, to have notified the plaintiff of such election, and offered to return the premiums within such reasonable time.

All this was necessary to make this election effectual and this

quasi forfeiture complete. 1st Addison on Contracts, Sec. 320, p. 466.

"It is not," says Mr. Addison, citing Davis *vs.* Burrell, 10 C. B., 821, "necessary to give the covenantor notice to pay, or to make any personal demand upon him, it being his duty to seek out the proper parties to whom the rates are to be paid." 1st Addison on Contracts, Appleton Ed., p. 468.

So Mr. Pomeroy: "Wherever a case involves the necessity of an election, it is an elementary rule that any person who is *sui juris*, not under disabilities, is both entitled and bound to elect."

So in Nunez *vs.* Daniel 10 Wallace, 560, the Court say: "No time having been specified within which the crop should be sold, or the money raised otherwise, the law annexed as an incident that one or the other should be done within a reasonable time, and that the sum admitted to be due should be paid accordingly."

So in Shearer vs. Jewitt, 14 Pick. 332. "When the contract is silent as to the period of performance the law infers an agreement that it shall be executed within a reasonable time, and regards such provision as incident to the contract."

Chitty on Contracts, 7 Am. Ed., 750.

See Patrick *vs.* Woodruff, 96 N. Y., 565. "It is undoubtedly a general rule * * * * that where an option to be exercised, or a condition to be performed, is not limited by an a agreement, then such option must be acted upon, or condition performed or abandoned within a reasonable time.

See further 2nd Wharton on Contracts 644-45-677.

Tordley's case, 1st Leonard, 63.

Clippendale *vs.* Thurston, 4 C. & P., 93.

Roberts *vs.* Beatty, 2 Penrose & Watts, 63.

Twin Lick Oil Co. *vs.* Marbury, 91 U. S. and cases collated.

Under a contract in the alternative, the party who by its interpreted terms is to take the step at which the choice of ways presents itself, necessarily and of law elects by which one the fulfillment shall be. One of the consequences whereof is, that, if such party neglects to elect by fulfilling, the right of choice passes thereupon to the other party, who may sue for the breach of the alternative he prefers. * * * * If the contract, as interpreted, empower one of the parties to elect in any particular, how it shall be fulfilled, such party must take the first step by making the election; until which, there can be no breach by the other."

Bishop on Contracts, Sec. 1435.

Rippenhill *vs.* Loyd, 5 B & Ad., 772.

Watson *vs.* Walker, 3 Foster's Repts., 471–492.

Clifford *vs.* Hoffman, 5 Wendell, 500.

Tapping *vs.* Root, 5 Cowen, 404.

And when the facts are clear the question of reasonable time is always exclusively for the Court.

Tollen *vs.* Bergin, 12 Peters, 536.

And in that case, "delay in objecting by mail to the account

rendered from the 16th to the 28th day of May", was held unreasonable.

As illustrations of cases in which, as a matter of law, the Court has held the party not to have acted within a reasonable time, we cite,

Wood *vs.* C. M. & St. P. R'y. Co., 27 Wis., 54.
Boothly *vs.* Scales, 27 Wis., 626.
Carter *vs.* Carter, 14 Pick., 464.
2nd Chitty on Contracts, 7 Am. Ed., 750, and 10th Ed., 1061, Note.

It thus seems established, by reason and authority, that an election cannot be considered perfected, *until due and legal* notice thereof is given to the other party; and that the same results follow the neglect to give notice within a reasonable time as the neglect to give notice when a day certain is fixed for the election.

Irish *vs.* Dean, 39 Wis., 562.
Voechting *vs.* Graw, 55 Wis., 317.

And that notice must be due and legal notice. And we must insist that the notice given upon the 5th day of May, by simple reference to a letter sent to Mr. Nichols on the 14th of the previous month of March, with no information as to its contents or no intimation of the decision made by the company, was insufficient notice of an election.

In Joliffe *vs.* M. M. Ins. Co., 39 Wis., 111–117, it was held, "that when one party to a contract has the option to declare its forfeiture, on breach of condition by the other, declaring the forfeiture, must be made in plain and positive terms." Certainly the mere saying, "we have communicated to our agent, Mr. Nichols, the action of our directors, and the information should have been given to claimant before now" is far from notice given in plain and positive terms. In the above cited case the notice was as follows: "Unless you perform your part of the contract by a certain future date, naming it, I shall elect to consider myself relieved from its obligation." This was held a mere notice or threat, and not an effectual exercise of the option.

V.

The defendant contended in the court below, "that the policy contained an explicit provision defining the liability of the company in case of the death of the insured by his own hand, while insane, and *that previous to the trial, it had not been shown that the insured was insane at the time he took his life*," and counsel said, "The proofs of death do not show it—do not say how the death occurred. * * * It is true that the proofs were accompanied by a copy of the inquest and coroner's jury's verdict, but that is not legal evidence." The statement contained in the 7th paragraph of the certificate of division is as follows, "that notice and proof of his death by his own hand, when insane, was duly given and furnished to said company on

the 28th day of January, 1884, and within the time required by said policy," and that "as part of said proof, and in accordance with the requirements of the company, the said assured at the same time furnished and delivered to said company a duly certified copy of the coroner's inquest as aforesaid." This, we assume is to be taken as a verity. It is clear that this is consistent with the fact that by the express language and terms of the policy the company constituted itself, and not any court or jury, arbitrator and judge to determine, whether it was shown by those proofs, so furnished within the sixty days, that the deceased took his own life, while insane, and thereupon, at the same time, to determine whether they would refund the premium or pay the amount named in the policy.

So viewing this case, what becomes of the argument that perhaps the plaintiff on trial might possibly dispute the proofs of the coroner, and the manner of the death. Certainly there can be but one election, if made, and that election would stand good, until the trial, and the proof so offered and received, of death from any other cause, *would not authorize any election whatever at that time*, but simply subject the company to a verdict for the full amount of the policy, and a judgment in accordance therewith. Nor in this case would it lie in the defendant's mouth to say, that there had not been a satisfactory showing of the manner of the death, after their letter of March 14th, in which it is stated: "At a meeting of the directors, yesterday, the case of loss under policies * * * * * was fully considered, and it was decided that the case came under the insane clause of the policies." (Transcript, page 34.)

The company have retained that proof, and admit in their answer that it was received on the 28th day of January, and that the defendant *thereupon* in accordance with the terms of said policy, elected according to its judgment of the equities of the case, to repay to the plaintiff the sum insured, with interest.

When we have full evidence, as here, of the construction that the parties themselves have placed upon their contract, to-wit: That the election should be made prior to any action so brought, it seems to us that there is no question left for the Court. It will be observed that by Policy No. 105,844, issued by the company on the 19th day of September, 1881, it is simply provided "that in case the insured shall die by his own hand, while insane, the amount to be paid by the company on this policy shall be the amount of the premiums actually paid thereon, with interest." (Transcript, page 27.) But by Policy No. 115,218, issued upon the 20th day of September, 1883, this provision is further modified by an agreement "to pay the sum insured, or refund the premiums actually received, with interest thereon, according to its judgment of the equities of the case." (Transcript page 29). It is evident that the company had an object in making this change, to-wit, so that the parties insured should be led to believe that the amount of the policy would, in all probability, be paid in case of their death under

such conditions. No one would assume that the determination was to be postponed until the litigation in court should determine it. If that was the intention of the company it was a mere trap to delude and deceive the holder of the policy. There was no more reason for saying in this case that this determination should be postponed until trial; than under the former policy, that the absolute performance of the promise to refund the premium should be postponed until trial. Or in other words, that the party *should not recover the same until he had established his right by litigation.*

Death by one's own hand by reason of insanity, is clearly as much the result of natural causes as if resulting from any of the list of diseases which sweep men from existence, and there can be no equity ordinarily which should determine the choice of the company in the refunding of the premiums and avoiding the payment of the amount of the policy. The right of the plaintiff in our view of the case, vested at once upon the expiration of the sixty days, to recover the amount of the premium, if the company had elected so to refund, or else the full amount of the policy; and that right once vested could not in the nature of things be divested by any subsequent action of the company without our consent. Having a right of action at the expiration of the sixty days, it is right and proper that the plaintiff should be advised of the existence of his rights, and the amount which he was entitled to recover. It would be strange, indeed, if he was compelled to bring his action before election and when he was uncertain whether the amount which he was entitled to recover was to be determined by the action of the company on the trial, for under the construction of the defendant, although upon the trial it might be proved that the death resulted from the act of the insured, while insane, still the company would have the right, at that time (which from their action in this case it is presumed that they would exercise), to simply determine upon the refunding of the amount of the premium; certainly they ought not to be charged with the costs of that action if they had the right of determination at that time, for our right of action would not vest until the election had been made by the company, and after suit brought.

We fail to see any reason for counsel's saying that the Company only required proof in the first instance for the purpose of showing death, so that it might exercise its judgment (using the language of the policy), for one purpose; and that for exercising in another direction, by the use of similar, or almost similar language, it can be said to require no proof to be made to the company at all, but to the Court, and that it may avail itself of such proof after suit brought; so that upon the trial it may exercise its judgment as to the equity of making payment of the amount insured.

But the fact is, in this, and all cases, the Company requires proof of death, and it being unsatisfactory or irregular, may require further proof or examination on due notice of the party making the same; but not requiring it, it shall be bound thereby, and all mere formal proof will be held waived, unless the Company notifies the

party that it requires such proof in addition to that already made. Badger *vs.* Phœnix Ins. Co., 49 Wis., 400.

The original proofs promptly furnished, none other being required, are evidence *prima facie* that the claim exists in favor of the assured, and that claim, until due election, must be good for the whole amount insured.

In the Life Ins. Co. *vs.* Francisco, 17 Wallace, 672, where the representatives of the assured, were by the terms of the policy to furnish within a certain time, after the death of the insured, due proof of the just claim of "the assured," the Company having within that time furnished blank proofs, which were filled up, signed and sent to, and kept by the Company, without any suggestions, that such preliminary proofs were insufficient, either in form or substance, it was held, that the Court in a suit for the insurance money, *had no right to determine, as a matter of law, that the questions and answers do not establish the justice of the plaintiff's claim, and that the plaintiffs are not entitled to a verdict.*

We repeat, it is no argument to say, as defendant's counsel say, that on the trial the plaintiffs might establish death from some other cause. The illustration is not apt; it gives no light, it gives no strength to the defendant's argument. If good for anything it would apply to any proofs furnished to the Company and excuse the payment within the sixty days or ninety days limited in every policy. Such payment always must be made in view of the possibility of after-discovered fraud, or any after-discovered reason which would excuse its payment, *but the possibility of such a contingency has never yet been held to be an excuse for payment.*

The facts are, if the Company had made an election to refund the premiums, and had made it within this sixty days; if the claimant received the moneys, that would close the controversy; and if on the other hand, it were refused, the Company could then litigate the question of the truth of the plaintiff's averments, so it could suffer no loss by an election exercised within the limit provided by the policy. And the same remarks would apply to the determination of the Company to comply with the provision of the policy, not to pay the full amount. An action brought at the expiration of the sixty days, to recover the amount of the policy, could, in like manner, be defeated by showing that the Company had been defrauded by the action of the assured.

Our position is, and has been, that this election must be exercised within the term of sixty days fixed by the policy as a reasonable time, and that the insured took his life, while insane, and that the policy must be read as if these very words were incorporated therein. The plaintiff had the right to believe that he should receive something under the policy within sixty days after the submission of his proofs. Can the thought be for a moment entertained that this election may be indefinitely postponed, or need not be exercised until the coming in of the verdict. If this were so, what is the limit and where the forum, and how long

after the verdict is that election to be exercised—that right of determination of what shall be deemed equitable in the premises? Hall *et al. vs.* Delaplaine *et al.*, 5 Wis., 215. The plaintiff's right of action had, at the expiration of sixty days from furnishing the proofs, become a vested right, when once vested, certainly Christian Salentine waived nothing that was within the scope of his agency, by writing to the company on the 28th day of April, from whom he did not hear, and in demanding settlement and payment.

Is it not fair and within the spirit of the contract, that said determination should not have been indefinitely postponed any more than the payment of the amount insured, in ordinary cases for more than sixty days beyond the time of the proofs furnished to the company? The proofs showed all that was necessary, to authorize the company, if it saw fit, to make its determination, and exercise the option reserved. What more can be required? And we insist that showing this, unless such election was made within that time, that plaintiff would, at the end of sixty days, have a right of action to recover the amount of the insurance without any further demand or notice and proofs. It presented a valid claim, for which a valuable consideration had been paid, and nothing required us to make the election, or the right of election, the basis of our claim, for, until such election was exercised (if not exercised within a reasonable time) it was as if no such clause had been written in the policy, nor were we bound to anticipate that the company would make any election whatever, because, by the terms of the policy, our claim is fixed at three thousand dollars, and that claim, to all intents and purposes, remained valid until a due and legal election to refund the premiums, exercised within the sixty days; that sum was the only amount that could be known as due *in præsenti*, or *in futuro*, until an election to the contrary and we should not be called upon to anticipate that the company would determine it equitable not to pay the amount assured, and to make the basis of our claim the refunding of the premium and interest.

The very language of the clause in question, shows that the company had not insured the life for the amount of the premiums; it provides in terms that it will pay the amount insured, or refund the premiums actually received, etc., according to its judgment of the equities of the case. "Suppose," say defendant's counsel in the case below, "the plaintiff had shown the facts which are found in the special verdict to the company, and then made his demand of payment of either the sum insured, or the premiums paid with interest, and that the company taking the ground that the deceased was not insane, had refused to pay either, suit had then been brought and the insanity proven, would not the recovery be confined to what the company were bound to pay?" The question involves an absurdity: 1st, in the demand by the plaintiff of the sum insured, or the premiums; and 2d, it throws out of consideration the question of election, and when it is asked, would not the recovery be confined to what the company were bound to pay? we say yes; and that sum,

unless the election were made within sixty days, provided the proofs were properly furnished, would be the full amount of three thousand dollars. And a refusal in this as in any case of refusal would be made at their peril.

It was not for the plaintiff to demand an election, but the policy was good for the full amount, as to an involuntary suicide, until a determination not to pay, and to repay the premiums.

Even if our demand had been foolishly in the alternative, the company were bound to pay the amount insured, unless within the sixty days they had chosen to have refunded the premiums. The company never have been liable to refund the premiums, and now, by reason of their inaction, never can become liable therefor.

Counsel says that the measure of damages of the plaintiff in this action is the amount of money which the defendant has promised to pay without reservation. The amount of damage which it absolutely promised to pay is the full amount of three thousand dollars within sixty days after due notice and satisfactory proof of death of the insured, unless that proof shows that the insured died by his own hand while insane, in which case it promises to pay the amount insured, or refund the premiums actually received, with interest thereon, according to its judgment of the equities of the case. The insured had the right to understand, when he entered into this policy, that the company, if they exercised the option referred to, would do it within sixty days; *he had a right to understand that they might not exercise it at all;* that was within their own breasts, now then, if at the end of sixty days after proofs had been received showing the fact which authorized the right to exercise the option, and that option had not been exercised, why should it not be conclusively presumed that the Company had determined not to exercise it. As we have said, there was nothing in the policy by which they agreed to exercise any such option, but they did agree, within sixty days from the date of proofs received, to pay the amount due on the policy whatever it might be, and on the day succeeding the expiration of that sixty days, what was there to prevent an action upon the part of the plaintiff, and what right would the defendant then have, by the exercise of such an option, to deprive the plaintiff of that right to recover the full amount which they had promised to pay.

GEORGE P. MILLER,
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